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No. 85-2075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS PATZER, *et al.*,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH DAKOTA SUPREME COURT

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QUESTIONS PRESENTED

Four couples who teach their own children in a home school for reasons of religious convictions were convicted of truancy for the sole reason that they were not certified teachers.

1. Can a State satisfy its burden of establishing a compelling state interest when it introduces no evidence of any kind to substantiate its assertions of such an interest?

2. Is there proof that a compelling state interest is served when there is no scientific or academic evidence that children learn better from a certified teacher than when they are taught by their uncertified parents at home?

3. Has North Dakota chosen the least restrictive alternative to assure its interest in education when all twenty-two states enacting home school laws in the

past thirty years have not made such a requirement?

PARTIES

Petitioners are Thomas Patzer (N.D. S. Ct. No. 1096), Peggy Patzer (N.D. S. Ct. No. 1097), Raymond Larsen (N.D. S. Ct. No. 1098), Lorita Larsen (N.D. S. Ct. No. 1099), Richard Reimche (N.D. S. Ct. No. 1101), Kathy Reimche (N.D. S. Ct. No. 1102), Gerald Lund (N.D. S. Ct. No. 1103), and Sheryl Lund (N.D. S. Ct. No. 1104). Respondent in all cases is the State of North Dakota.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS PATZER, et al.,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Dakota entered in this proceeding on February 20, 1986.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court was published at 382 N.W.2d

631 (N.D. 1986). It appears in the appendix beginning at 1a. The written decision of the Bottineau County Court was entered on March 26, 1985. It is unpublished. It appears beginning at 22a in the Appendix. The written decision of the Stutsman County Court was entered on February 25, 1985. It is unpublished. It appears in the appendix starting at 16a.

JURISDICTION OF THIS COURT

Petitioners respectfully show the following as the grounds upon which the jurisdiction of this Court is invoked:

(i) This case seeks review of a decision of the Supreme Court of North Dakota filed on February 20, 1986. This is a criminal case (truancy).

(ii) An order denying petitioners' motion for rehearing in that court was entered on March 19, 1986. On May 13, 1986, the

Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States, entered an Order Extending Time To File Petition For Writ Of Certiorari. Said order extended the time of filing to and including June 17, 1986.

(iii) Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment to the Constitution of the United States

. . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

North Dakota Century Code § 15-34.1-03(1)

Compulsory attendance--Exceptions. The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

(1) That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-42-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

STATEMENT OF THE CASE

Petitioners are four married couples who teach their own children at home.

Tom and Peggy Patzer are Seventh Day Adventists who reside in Jamestown, North Dakota. At the time of trial Rev. Patzer was the minister of the Jamestown Seventh Day Adventist Church. Rev. Patzer has a

master's degree in theology. Mrs. Patzer has two years of college education. At the time of trial their school-age son, Jeremy, was eight.

Raymond and Lorita Larsen are Seventh Day Adventists who also reside in Jamestown. Dr. Larsen is an M.D. with a specialty in ophthalmology practicing in Jamestown. Mrs. Larsen has a bachelor of science degree in nursing. Her course of instruction included courses in psychology, sociology, child psychology, child development, and children's literature. At the time of trial their children, Michael and Brian, were nine and seven respectively.

Richard and Kathy Reimche are members of a Lutheran Brethren Church and they reside in Bottineau County, North Dakota. Mr. Reimche has a high school diploma and one year of post-high school

instruction. Mrs. Reimche has a high school diploma. Their children, Rachel and Joshua, were ages eight and ten respectively at the time of trial.

Gerald and Sheryl Lund are Seventh Day Adventists residing in Bottineau County. Mr. Lund has a high school diploma. Mrs. Lund has one and one-half years of college. The Lunds' child, Naleah, was eight at the time of trial.

Each of these families decided to teach their children at home because of their religious convictions which compel them to do so.[1] The sincerity of their

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[1]The North Dakota Supreme Court noted that the state conceded that these families' religious beliefs were sincere. App. at 7a. Moreover, the state supreme court held that their beliefs concerning the education of their children were burdened because of the state's requirement of teacher certification. The only issues before this Court relate to the compelling state interest-least restrictive means test. In order to keep this petition as brief as possible for a fair

religious convictions has never been contested at any stage of this proceeding.

The Patzers and Larsens were tried in a consolidated bench trial in the Stutsman County Court. The action against these two families was commenced by criminal complaints filed on October 31, 1984, charging them with violation of the compulsory attendance provisions of North Dakota Century Code [N.D.C.C.] § 15-24.1-05, an infraction. The maximum penalty for an infraction is a fine of $500. N.D.C.C. § 12.1-32-01. However, for repeated offenses the penalty is thirty days in jail, a $500 fine or both. Id.

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statement of the issues, we do not describe in detail the evidence and the expert testimony concerning their religious beliefs which formed the basis of the North Dakota Supreme Court ruling on the sincerity and the "burden" prongs of this Court's Free Exercise Clause test.

All entered pleas of not guilty and trial was held before the Honorable Harold Herseth, County Judge, on January 29, 1985. Judge Herseth issued a memorandum opinion on February 25, 1985, finding each defendant guilty as charged and judgments of convictions were entered against each of them on March 19, 1985.

Each of the four defendants were fined $500, with the sentence suspended upon condition that they enroll their children in an approved school. App. at 29a-32a.

The Reimches and Lunds were tried in a consolidated proceeding in Bottineau County. Complaints were filed against both families on September 11, 1984, charging them with violation of the same compulsory attendance statute as in the Stutsman County matter. A bench trial was conducted on January 31, 1985. On

March 26, 1985, the Honorable A.S. Benson, County Judge, issued a memorandum opinion finding the defendants guilty of the violations charged. Judgments of conviction were entered on April 9, 1985. Each of the four defendants were fined a total of $250 plus court costs of an additional $250. One-half of each amount was suspended if their children enrolled in approved school. App. at 33a-40a.

The key issue in these cases was the North Dakota requirement that all teachers, including parents who desire to teach their own children at home, must be certificated by the state of North Dakota. It is without dispute that none of these parents are certificated, nor could any of them become certificated other than by returning to college for the courses dictated by the state.

The parents claimed that the require-

ment that they possess a teaching certificate effectively forbade them from teaching their own children. This is made clear by the suspension of each of the family's sentences if they ceased their home education and enrolled their children in an approved school. Since their sincere religious beliefs required them to teach their children at home, this requirement effectively precluded them from exercising an important aspect of their religious convictions. They claimed that this constituted a violation of their rights to the free exercise of their religious freedom under the First Amendment.[2]

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[2]In the Bottineau County case, the trial judge noted that petitioners raised the First Amendment claims which are urged here as follows:

> The Court determines that the only defense that the Reimches' and Lunds' have, which would justify their failure to enroll their children in pub-

In the Stutsman County case the trial court held that the defendants had satisfied their burdens of proving the sincerity of their religious beliefs and that the state's requirement burdened the free exercise of their religious faith. App. at 19a.

In the Bottineau County case, the trial court held that the defendants had proven that their religious beliefs were

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lic school, is the Free Exercise of Religion Clause of the first amendment of the United States Constitution. . . .

App. at 23a.

In the Stutsman County case the trial judge noted the preservation of the First Amendment arguments as follows:

> The defendants do not challenge the constitutionality of the law on its face, but challenge the constitutionality of the compulsory attendance laws, as applied to them.
>
> The main premise of the defense is that the defendants have a religious belief that obligates them, as parents, to provide the education of their children at home . . . .

App. at 17a.

sincere, but held that the state's requirement did not constitute a burden of the exercise of their faith. App. at 24a. This finding was reversed by the Supreme Court of North Dakota. App. at 8a-9a.

However in both cases, the trial judges considered the issue of whether the state had proven that it had a compelling state interest in the requirement of teacher certification for homeschooling parents, and whether this objective was accomplished by the least restrictive means available to the state. App. at 19a-21a, 24a-25a.

In each case, the trial court held that the state did have a compelling state interest in requiring teaching certificates for homeschooling parents and that this was the least restrictive means possible to accomplish the state's

objective of adequacy of education. App. at 21a, 24a-25a.

The most significant feature of both of these trials was the evidence introduced by the homeschooling families and the lack of evidence on the part of the state concerning the compelling state interest-least restrictive means issues.

The state introduced absolutely no evidence of any kind in either trial to attempt to carry its burden that the state's requirements satisfied the compelling state interest-least restrictive means tests. App. at 12a. They called no experts. They did not ask the trial courts to take judicial notice of any legislative facts. Nor did they ask the trial courts to take judicial notice of any scientific studies to support their position.

Although the state supreme court

implies to the contrary in a footnote, see fn.4, App. at 12a, neither prosecuting attorney brought any legislative facts or scientific studies to the attention of the state supreme court in their briefs.[3]

In contrast to the total lack of effort on the part of the state to carry its burden of proving that its requirement served a compelling state interest, the defense called three expert witnesses: Raymond Moore, Ed.D., Donald Erick son, Ph.D., and Rousas John Rushdoony, Ph.D., in the Stutsman County case and in the Bottineau County case again called Dr. Raymond Moore.

Dr. Donald Erickson, a professor at

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[3]To demonstrate this failure we have reprinted the entire texts of both prosecuting attorneys' briefs filed in the North Dakota Supreme Court in the appendix. App. at 41a, 48a.

U.C.L.A. Graduate School of Education, testified that he chairs the specialization of Administration and Policy Studies for said school.[4] Dr. Erickson testified that one-on-one tutoring of the type engaged in by these parents was "anybody's ideal of an educational arrangement. I suppose, one person teaching another person is the most effective teacher-pupil relationship we know anything about." S-Tr. at 132.[5] He testified that hundreds of scientific studies

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[4]Dr. Erickson testified that he has testified as an expert witness in a number of cases involving religious freedom and education, including Wisconsin v. Yoder, 406 U.S. 205 (1972), where his testimony was quoted by this Court. See 406 U.S. at 212.

[5]We refer to the transcript in the Bottineau County case as "B-Tr." The Stutsman County transcript is denoted "S-Tr." Because these transcripts are voluminous we do not submit them at this time.

confirmed the effectiveness of one-on-one teaching. Id. at 134.

He testified that there were no reputable studies at all which demonstrated a correlation between teacher's certification and learning by children. Id. at 135. The following testimony concerned North Dakota's specific requirements of teacher certification.

> Q. Okay. Have you an opinion as to whether these requirements of teachers of North Dakota contribute to the learning of their students?
>
> A. Yes I do.
>
> Q. And what is that opinion?
>
> A. I have a fairly strong opinion in that regard that we've reached the point where teacher's certification has become self-defeating.

Dr. Erickson contrasted legal and medical education which he said included the mastery of a specific body of knowledge. Id. at 142. But as to the education of teachers, he said:

> The medical school knows how to turn out doctors but I can flatly tell you that schools of education do not know how to turn out teachers. Now we try different things. We do our best. Use our imaginations. We try to extrapolate from the evidence that we have but the evidence does not provide us with at all, a general definition of what constitutes a good teacher. . . . Some of the best teachers I have ever seen neither have certificates nor have they ever darkened the door of a graduate school of education.

Id. at 142-43.

He again gave his expert opinion on the specific requirements imposed by states for teacher's certification. He said:

> . . . I have never been able to understand, I've had a lot to do with State regulation, I've never been able to understand why [where][6] those people who get [make] the regulations get their special knowledge. They act as if they know things that no scholar in the world seems to know. They're willing to specify in such

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[6]The trial transcript was made by tape recording. There are numerous minor transcription and typographical errors, e.g., "futile" was transcribed "feudal."

detail.

Id. at 145.

Finally, he was asked the following question concerning teacher certification:

> Q. . . .[N]ow I'd like to know whether you consider teacher certification, as it is required here in North Dakota, whether you think that is necessary to learning?
>
> A. Definitely would not consider it necessary for learning.

Id. at 146.

Dr. Raymond Moore[7] testified that one

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[7]Dr. Moore has held a variety of professional educational positions after obtaining his doctorate from the University of Southern California. He has been a public school teacher, principal and superintendent. He has held number of positions in private religious schools as well, including that of college president. He is a former official of the United States Department of Education. For the past fifteen years he has been the president of the Hewitt-Moore Foundation which engages in educational research with particular emphasis on early childhood education and homeschooling. He has served as a consultant, he testified, in hundreds of homeschooling cases

of the reasons that teacher certification training has no real relevance in the home school setting, is that such training consists largely of courses which are geared to handling a classroom full of students. Id. at 46. In fact, Dr. Moore testified that because of the nature of teacher training "in the tutorial system the average teacher, who is certified to teach in classrooms, does not understand the tutorial system and therefore even a certified homeschool teacher finds out they have more problems than others because they have [been] taught classroom techniques. . . ." Id.

Dr. Moore also corroborated Dr. Erickson's testimony that teacher's certification was not necessary to "success-

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and has actually testified as an expert witness in thirty to forty homeschooling trials.

fully educate a child in the home." Id at 47.

Moreover, in both trials Dr. Moore testified that he had professionally interviewed all four families[8] and concluded that these families would be able to "successfully educate their children." Id. at 48.

Dr. Moore testified that he reviewed the standardized achievement test score given to Michael Larsen.[9] These results were: Vocabulary, 99th percentile; Reading, 95th percentile; Language, 79th percentile; Math, 66th percentile; Composite, 86th percentile. Id. at 53. This correlates to 36 points above the na-

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[8] S-Tr. at 48 and 53, B.-Tr. at 59.

[9] Michael Larsen was the only child in this case who had been homeschooled long enough to have gained the results of a standardized test score.

tional average.

Dr. Moore testified that about eighty studies have been done comparing homeschooling students to students in institutional schools, and that regardless of the educational level of the parent,[10] the average homeschooled child will score 30 percentage points higher on a standardized test than the average child taught in an institutional school. Id. at 35-36.

All of the families took timely appeals from these decisions to the North Dakota Supreme Court. That court consolidated these cases for decision.

In its opinion, the North Dakota Supreme Court held that the parents' religious beliefs were sincere and that

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[10]He testified that the average homeschooling parent has 13 to 15 years of education. Id. at 37-38.

they were burdened by the state's requirement of teacher certification. App. at 8a-9a. But the state supreme court held:

> Balancing the defendants' religious beliefs and the nature of the burden imposed upon those beliefs by the teacher certification requirement against the state's interest in certification as a means of ensuring that its children are educated by capable persons, we find the balance in this case tips in favor of the state.

App. at 15a.

ARGUMENT

I. THE NORTH DAKOTA SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. A Finding of A Compelling State Interest Must Be Supported By Evidence In the Record.

There is little dispute in this case about the underlying constitutional issues. Religious freedom and the freedom of parents to direct the education of their minor children are both well-estab-

lished constitutional rights. Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1924); Meyer v. Nebraska, 262 U.S. 370 (1923). See also, Mazanec v. North Judson-San Pierre School Corporation, 614 F.Supp. 1152 (N.D. Ind. 1985).[11] The

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[11] That court said, 614 F.Supp at 1160:

This court has no difficulty with the values that were announced in Pierce v. Society of Sisters, 268 U.S. 510 . . ., 60 years ago. Nor does this court have any difficulty in concurring with those courts that found within the ambit of the free exercise clause a constitutional right to educate one's children in an educationally proper home environment, understanding that the State retains a legitimate interest in the fulfillment of certain minimal requirements as established legislatively and administratively as a matter of public policy. This court is aware of and concurs in the decisional line which honors the good faith efforts of parents to educate their children at home. Minnesota v. Newstrom, 371 N.W.2d 525 (Minn. 1985); State v. Popanz, 112 Wis. 2d 166, 332 N.W.2d 750 (1983); Roemhild v. State, 251 Ga. 569, 308 S.E.2d 154 (1984); Bangor Baptist Church v. State of Maine, 576 F.Supp. 1299 (D.Maine 1983);

North Dakota Supreme Court had no difficulty identifying this Court's three step analysis of free exercise claims. Citing Yoder, the state court stated these three issues as follows:

> Resolution of a conflict among the state's interest in its compulsory education laws, the fundamental rights and interests protected by the free exercise clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children necessitates a three-fold inquiry: (1) whether the activity interfered with by the state is motivated and rooted in a legitimate and sincerely-held religious belief; (2) whether the parents' free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their reli-

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Delconte v. State, 313 N.C. 384, 329 S.E.2d 636 (1985); and Grigg v. Georgia, 224 Ga. 356, 297 S.E.2d 799 (1982).

Near the turn of this century the Appellate Court of Indiana recognized home study as an option. State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904). (It is now doubtful that the requirements of a formally licensed or certified teacher as there required would now pass constitutional muster.) [Emphasis added.]

> gious practices; and (3) whether the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the parents in exercising their religious practices.

App. at 6a.

As to the first test, the state court noted that the state conceded that the parents' beliefs that the Word of God compelled them to teach their children at home were legitimate and sincere religious beliefs. App. at 7a. As to the second test, the court had little trouble in finding that the free exercise of the parents' religion was burdened by the state's requirement that dictated the exclusive use of certified teachers. App. at 7a-9a. The burden is easy to understand. The parents' believe that the Bible commands them to teach their own children while the state law convicts them of a crime for following this reli-

gious belief. Subjecting a person to criminal sanctions for the exercise of his religious beliefs is the clearest example of a burden contemplated by this Court's second part of the free exercise tripartite test.

It was the application of the third part of the test which caused the North Dakota Supreme Court difficulty. This Court succinctly stated this test in Thomas v. Review Board, 450 U.S. 707, 718 (1981) as follows:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, supra, at 215.

It is clear from this passage and many others that the state bears the

burden of proving both that the interest is compelling and that the means chosen are the least restrictive to accomplish this interest.

The normal method of proving facts in a lawsuit is by the use of evidence. This rather simple principle of law somehow evaded the attention of the North Dakota Supreme Court. In a remarkably revealing footnote, the North Dakota court noted the state's total failure of proof to substantiate its assertion that the exclusive use of certified teachers was the least restrictive means available to achieve its compelling state interest. The court said:

> 4 The state did not formally introduce any evidence during the trials relating to the "compelling state interest" and "least restrictive means" issues. Rather, arguments were submitted by brief. However, the lack of formal proof on the issues of "compelling state interest" and "least restrictive means" is not

necessarily fatal to its case.

> A court may take judicial notice of legislative facts in reviewing the constitutionality of legislative schemes. See 1 Weinstein's Evidence ¶ 200[04] at pp. 200-20 through-200-21 (1985) [quoting Karst, Legislative Facts in Constitutional Litigation, 1960 Sup.Ct. Rev. 75, 84]; . . . . Houser v. State, 85 Wash. 2d 803, 540 P.2d 412, 414-415 (1975), overruled on other grounds, State v. Smith, 93 Wash. 2d 329, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980).

What the state court says in this passage is that the state's arguments alone are sufficient evidence for it to find that the state has carried its burden of proof. By referring to the principle that a court may take judicial notice of legislative facts[12] in review-

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[12]Generally, legislative facts are considered to be the product of legislative hearings conducted in connection with the adoption of a piece of legislation which later undergoes a legal challenge. 1 Weinstein's Evidence ¶ 200[04] at fn.'s 6 and 7. There is nothing in the record to suggest that any such hearings were held in connection

ing the constitutionality of legislative schemes, it may seem to appear that the state's briefs brought out such facts. This is simply not true. We have set out the state supreme court briefs of both prosecuting attorneys in full in the appendix. They are totally devoid of anything that would remotely resemble any legislative facts.[13]

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with this North Dakota section. The state supreme court cites no such facts, nor does either prosecuting attorney in the briefs. On the face of the legislation, it appears to be directed to regular parochial or private schools and the requirements of certified teachers in such institutions. The homeschooling context is not even specifically mentioned in the legislation and common sense would indicate that the legislature probably considered no facts relating to homeschooling in the adoption of this bill. In any event, the record is totally devoid of any suggestion that such legislative findings and facts actually exist.

[13]Petitioners would seriously question whether a prosecutor in a criminal case would be permitted by the principles of

The arguments which the state supreme court found sufficient to carry the state's burden of proof are nothing more than unsubstantiated, and often unrelated, assertions.

The closest that the Stutsman County prosecutor came to arguing that there was a compelling state interest were two arguments which he claimed demonstrated "numerous urgent public policy reasons" for the state's program. He never attempted to relate these arguments to the requirement of certified teachers, but the state supreme court found them per-

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due process to attempt to bring out legislative facts for the first time in a brief to an appellate court. It would appear to us, that prosecutors should be required to ask the trial court to take judicial notice of such facts during the trial. However, the failure of the prosecutors to ever bring forward any such facts at any point in time should eliminate this issue from this case.

suasive nonetheless.

The first argument was that:

> Our schools not only teach, but they are also responsible for administering to the health needs of children by providing a reservoir of professional expertise capable of ferreting out health-related problems at an early state. Primary school pupils are administered eye and hearing tests to determine any impairment in these two crucial faculties. Regular attendance at the public school guarantees proper immunization from disease, at least one balanced meal a day, and a certain minimal protection from parental abuse or neglect (via reporting requirements).

App. at 46a.

There is no evidence in the trial record that any of these services actually are provided in the public schools in Stutsman County. But assuming these services are provided, there is little to suggest, either by evidence or common sense, that certified teachers play any role in these health-related issues. One would assume that certified teachers are

not administering eye or hearing examinations. There is serious reason to doubt that certified teachers administer immunizations as well. As a general rule, certified teachers do not cook "at least one balanced meal a day" for their students. There is also nothing to show that parental abuse is prevented in any fashion by a certified teacher.

These arguments are not only without merit on their face, but it requires a strange sense of what is legally persuasive to argue that certified teachers can perform eye examinations and other health services better than parents when two of the defendants are an ophthalmologist and a nurse.

The second "public policy reason" which can be identified in this brief is as follows:

> Now, in the case before this

> court, children taught in a home school may not get the same exposure as ones taught outside the home, and therefore not have available to them options later in life should they choose not to follow a lifestyle like that of their parents. The child should receive a general, well-rounded education, which may include, for instance, lessons learned by an encounter with a bully or two. "Education" is not just that which is received in the classroom, but in the hallways and on the playgrounds.

App. at 47a.

One can only hope that the prosecutor was not attempting to argue that children are well-served by encounters with certified teachers who are bullies. We assume that he meant children who bully other children. If this is his argument, it is simply irrelevant to whether or not the parent should be a certified teacher, because the state concedes that if these parents were certified they could teach their children at home, regardless of the important lessons the children might

otherwise learn from a bully.

The brief from the prosecuting attorney in Bottineau County is a bit more traditional, but nonetheless contains no evidence, no judicially noticeable facts, and no references to scientific studies. His argument consists entirely of the citation of three cases, none of which dealt with the requirement of a certified teacher in a homeschooling context.[14] He ended with the following:

> Like West Virginia, North Dakota attempts to insure that children receive quality instruction. North Dakota requires not only certification of teachers, but also continuing education and training for teachers in order to maintain their certification. The compelling interest of the State to provide education to children can not be met by anything less than having instructors who have the ability and training needed to teach.

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[14] State v. Rivinius, 328 N.W.2d 220 (N.D. 1982); State ex rel. Nagle v. Olin, 415 N.E.2d 279 (Ohio 1980); State v. Riddle, 285 S.E.2d 359 (W.Va. 1981).

App. at 55a.

While this argument is not frivolous on its face, it cannot stand in the face of testimony by two well-qualified experts stating that there is no scientific evidence to support these assertions.

These kinds of unsubstantiated arguments have been rejected time and again by this Court. In Carey v. Population Services International, 431 U.S. 678, (1977), this Court considered whether or not an unsubstantiated assertion that prohibiting the sale of contraceptives to unmarried persons under sixteen would serve the purpose of reducing the amount of sexual activity between such persons. Like the assertion in this case, there is a certain amount of common sense appeal to such an assertion. But the state in that case produced no evidence to support

its argument, while the plaintiffs submitted testimony and cited studies to the contrary. This Court said:

> It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based upon a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

431 U.S. at 696.

In the same vein, in Thomas v. Review Board, supra, when the State of Indiana attempted to argue that its policy in denying unemployment compensation would create "widespread unemployment," this Court replied that "[t]here is no evidence in the record to indicate that" this would indeed take place. 450 U.S. at 719. As to the other argument raised by the state, that a victory for Thomas would cause inquiries by employers into

job applicants' religious beliefs, this Court again said: "there is no evidence to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position." Id.

Likewise, in Sherbert v. Verner, 374 U.S. 398, 407 (1963), this Court answered an assertion about the possibility of false unemployment claims with the words: "Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance."

The state in this case simply did not take seriously its burden of proof. This cannot be countenanced, especially in a criminal case. Criminal convictions,

however minor, have an obvious impact upon the lives of professional men like Dr. Larsen and Rev. Patzer. But even ordinary citizens should not be convicted of crimes and required to forfeit their truly-held religious beliefs when the state fails to introduce one scintilla of evidence to justify their bare assertions of a compelling state interest.

The North Dakota Supreme Court does not give any light in its critical footnote concerning any independent facts it discovered to justify its ruling in spite of a total lack of evidence in favor of the state's position, and further in spite of the substantial evidence in favor of the families' position. In fact, the authorities cited by the state supreme court in this footnote is generally favorable to the parents' position on this issue. In the case of Houser

v. State of Washington, 85 Wn.2d 803, 540 P.2d 412 (1975), the issue was whether or not the trial court improperly took judicial notice of two scientific studies which supported the state law setting the drinking age at 21. The plaintiff who challenged the law contended that said studies should not have been noticed by the trial court. The Supreme Court of Washington upheld the trial court's admission of such studies into evidence. This case does not stand for the principle that the state can produce no evidence whatsoever in constitutional litigation.

Likewise, the rather excellent material in Weinstein's series on evidence which is cited in this footnote, 1 Weinstein's Evidence ¶ 200[04], is not of much help to the North Dakota Supreme Court. There is not one word in this treatise

which would lead to the conclusion that a bare unsubstantiated assertion of a compelling state interest would ever suffice as proof of the same. In fact, this article cites Carey v. Population Services International, supra, Weinstein, supra, at fn. 17, p.200-23, for just the opposite proposition.

We would submit that the protection of religious freedom as well as the quality of both trial and appellate advocacy would be improved if this Court would grant certiorari in order to reverse this case for the failure of the state to even attempt to prove its case. Courts and attorneys practicing at all levels will be given a signal that they have a duty to put evidence in the record to justify their position in constitutional litigation. This can be done by factual evidence, expert opinion, judicial notice,

including judicial notice of legislative facts, and by judicial notice of scientific studies where appropriate. But in some form or another there must be evidence in the record to sustain the position advanced by the state in constitutional litigation if constitutional-rights are to retain any semblance of protection.

B. Requiring Teacher's Certification for Homeschooling "Flunks" the Compelling State Interest Test.

It is clearly established that for the statutory requirement of teacher's certification to survive a religious freedom challenge the requirement must be proven to serve a compelling state interest. Wisconsin v. Yoder, supra. In this case the issue is not whether the state's interest is compelling. We concede that a state has such an interest in seeing

that children are educated. Rather the issue here is whether or not the state's interest is actually served by the requirement it has erected.

It is certainly praiseworthy that a state desires to see children educated. But before a state can overcome a family's claim of religious freedom there must be more than a laudable desire, it must be proven that said desire is actually accomplished by the regulation in question.

The evidence in this case is totally without challenge. Children who are taught at home will become well educated. In fact the uncontroverted testimony of Dr. Moore was that regardless of the educational level of the parent, over eighty studies had indicated that the child taught at home would score thirty points higher than the child taught in an

educational institution (i.e., a public or private school).

The testimony that these children will receive a good education was also uncontroverted. In fact, the state conceded as much in one of the briefs before the state supreme court.[15] The testimony

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[15]The state said:

> Now it may be that the children of the Patzers and the Larsens are receiving the very best of an education at home. But should each and every parent regardless of their intentions be able to decide whether or not a given child should attend a public school or be educated at home? It goes without saying that one of the very fundamental reasons for having compulsory school attendance laws is that what one person's idea is as to a proper education for a child may not be the same as another's. It may be that family "A" believes that part of the basic education for a child between six and 10 years is learning how to drive a combine and tractor, and that all this reading, writing, and arithmetic is a bunch of nonsense. To weed out family "A", families like the Patzers and Larsens must give way. App. at 45a.

was of the one child who had been home-schooled long enough to have been tested, he scored in the 86th percentile, 36 points above the national average.

The testimony concerning the lack of correlation between learning and possessing a teaching certificate was likewise uncontroverted and devastating. Dr. Erickson, of the prestigious U.C.L.A. graduate school of education, testified that there are no studies whatsoever which demonstrate such a correlation. He described the process of teacher certification as "self-defeating." His testimony, that possessing a teaching certificate as required by the state of North Dakota is definitely not related to learning, was uncontroverted and unchallenged even by argument.

Dr. Moore testified that possessing a teacher's certificate for home education may actually be a hindrance, because the training is geared to the classroom setting, not to one-on-one tutoring like the home school is operated. This too was unchallenged.

Now the state supreme court noted that North Dakota was not attempting to prohibit homeschooling, rather simply regulate it by the requirement of a certified teacher. App. at 5a. Therefore, the state recognizes that homeschooling is a valid method for educating a child. However, the state has attempted to prevent all but members of the formal teaching profession from engaging in this superior method of child education.

There is absolutely no showing that allowing homeschooling by parents who are not certified teachers will in any way

harm a child's education. Indeed the uncontroverted testimony was that the child would score 30 points higher on an achievement test than his institutional counterparts.

The testimony of Dr. Rousas John Rushdoony[16] put in the record the all too familiar fact of the rising problem of illiteracy, both complete and functional, in this country. He testified that federal studies indicated that thirteen percent of the adult population, products of our state schools, are actually or functionally illiterate. B.-Tr. at 172.

If instruction by a certified teacher was any guarantee of an educated child as the end product, why would these unacceptably large numbers of the products of

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[16]Dr. Rushdoony was called as an expert on both educational philosophy and religion.

our public schools be actually or functionally illiterate?

The state has no constitutional power to force families to give up religious convictions about home education, with its proven record of academic superiority, and force them into a system with a proven record of producing a record number of illiterate Americans.

The interest in an educated populous is indeed important to every state. But the record in this case devastates any notions that teacher certification in the homeschooling context in any fashion serves such state interest.

C. Teacher's Certification is Not the Least Restrictive Means Available to Assure the State's Interest in the Education of Children.

As we noted earlier in footnote 15, the state argued below that in order to

weed out families who thought that children should learn to drive tractors and combines to the exclusion of basic academics, families like those before the Court "would have to give way." App. at 45a.

This is an implicit concession by the state that its regulation is not the least restrictive means available to assure itself of the education of children. The purpose of these laws are to trap "wolves," that is families who would abuse their children's education. It is conceded that the families before this Court are "sheep." The least restrictive means test requires the state to create a wolf trap that only catches wolves not sheep as well, if at all possible to do so.

It is clearly possible to do so with home education. Only two other states

require teacher's certification for all its teachers--Iowa and Michigan.[17] None of these states adopted laws specifically directed at home education. Home educators got caught in the "wolf trap" designed for institutional schools.

There are twenty-two states[18] which

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[17]See, Iowa Educ. Code § 299.1; Michigan, Mich. Comp. Laws § 388.553.

[18]These states are: Arizona, Ariz. Rev. Stat. § 15-802, enacted 1982; Arkansas, Ark. Stat. § 80-1503.4, et seq., enacted 1985; Colorado, C.R.S. § 22-33-104 (2) (i) enacted in 1963; Florida, Chapter 85-144, Laws of Florida, F.S.A. § 228.041, enacted 1985; Georgia, Geo. Code Ann. § 32-2104 (b), enacted 1984; Louisiana, LSA-R.S. § 17:236.1, enacted 1984; Mississippi, Miss. Code Ann. § 37-13-91 (3) (c) enacted 1982; Missouri, § 167.031 R.S.Mo., enacted 1977; Montana, Mont. Stat. § 20-5-102 (2) (f) enacted 1983; Nevada, N.R.S. 392.070, enacted 1956, see also Nev. Admin. Code Chap. 392 §§ 2-8, issued in 1984; New Mexico, N.M.S.A. § 22-1-2 (U), and § 22-1-2.1, enacted 1985; Ohio, Ohio Rev. Code § 3321.04 (A) (2); enacted 1976; Oregon, O.R.S. § 339.030 (6), enacted 1985; Rhode Island, § 16-19-1 General Laws of Rhode Island, enacted 1984; Tennessee, T.C.A. § 49-6-3050,

have adopted statutes specifically dealing with home schooling since 1956.[19] Not a single state which has adopted a homeschooling statute ir the past thirty years has felt it necessary to require teacher's certification as a requirement for all families which teach their children at home. Several of these states formerly had a law like North Dakota's.[20] That is, the law did not

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enacted 1985; Utah, Utah Code Ann. § 53-24-1 (2), enacted 1957; Vermont, V.S.A. § 1121 (2), enacted 1981; Virginia, Code of Virginia § 22.1-254.1, enacted 1984; Washington, R.C.W. § 28A.27.010 (4), enacted 1985; West Virginia, W.Va. Code § 18-8-1, enacted 1983; Wisconsin, 1983 Wisconsin Act 512, Wisc. Stat. § 115.01 (1r), § 118.15 (4), § 118.165 (1), enacted 1983; Wyoming, W.S. § 21-4-101, et. seq., enacted 1985.

[19]This number excludes homeschooling laws which may have been passed in 1986.

[20]See, e.g., Florida, F.S.A. § 232.02 (4) (1982), and Florida Admin. Reg. 6A-1.951 (1974); New Mexico, N.M.S.A. § 22-10-3 (1981); Virginia, Virginia Code §

specifically address homeschooling, but contained a blanket requirement that all teachers possess a teaching certificate.

Moreover, virtually all of the remaining states permit homeschooling under some other statutory scheme which does not specifically mention home education. For instance, approval of a course of instruction by local or state education authorities is a legal means of homeschooling children in twelve states whose laws do not specifically employ the words "home schooling" or "home education." None of these states have a blanket requirement that all teaching must be done by a certified teacher.[21]

22.1-254 (1980); Washington, R.C.W. § 28A.27.010 (1980).

[21]These states are: Alaska, Ala. Stat. § 14.30.010 (b) (1) (C) (10) [full-time correspondence school approved by the state]; Connecticut, Conn. Gen. Stat. Ann. § 10-184 [local

This Court has often looked to the experience of other states as a part of the evaluation of a claimed compelling state interest. See, e.g., McDaniel v. Paty, 435 U.S. 618 (1978). In McDaniel, this Court held that although many states once held the view that clergy disqualification was necessary for

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approval of equivalent instruction]; Delaware, Del. Code § 14-2703 (a) [local approval of equivalent instruction]; Hawaii, Haw. Rev. Stat. § 248-9 (6) [local approval of alternate educational program]; Idaho Code § 33-202 [local approval of comparable instruction]; Maine, Maine Rev. Stat. Ann. § 5001 (2) (D) [local approval of equivalent instruction]; Maryland, Ann. Code of Md. § 7-301 (a) [local approval of instruction]; Massachussetts, Mass. Gen. Laws Ann. Chap. 76 § 1 [otherwise instructed in a manner approved by local authorities]; New Jersey, N.J. Stat. Ann. § 18A:38-25 [local approval of equivalent instruction]; Pennsylvania, Penn. Stat. Ann. Title 24 § 1327 [local approval of a qualified tutor]; South Carolina, S.C. Code § 59-65-40 [state approval of substantially equivalent instruction]; South Dakota, S.D. Comp. Laws § 13-27-3 [local approval of competent alternate instruction].

the good of the principles of disestablishment,

> The essence of this aspect of our national history is that in all but a few States the selection or rejection of clergymen for public office soon came to be viewed as something safely left to the good sense and desires of the people.

435 U.S. at 618.

Comparison to other states has also been made by this Court for the purpose of evaluating the least restrictive means tests. See, e.g., Thomas v. Review Board, supra ["there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position." 450 U.S. at 719]. [Emphasis added.]

The North Dakota Supreme Court made a comparison of sorts with other states in the process of evaluating the claim of

the state that teacher's certification was the least restrictive means available in advancing the state's interest in the education of children. See discussion at App. at 12a-15a. However, this discussion appears to indicate that the court placed reliance for its understanding of the state of homeschool legislation upon a 1982 law review article.[22] However, this article does not mention the homeschooling legislation enacted in seventeen of the twenty-two states which now have homeschooling laws for the obvious reason that they were enacted subsequent to the time the article was written. See, fn. 18, supra, listing the states which have enacted homeschool legislation.

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[22]J. Tobak and P. Zirkel, Home Instruction: An Analysis of the Statutes and Case Law, 8 U. Dayton L. Rev. 1 (1982).

The North Dakota Supreme Court seems to have relied on the fact that the only alternative to teacher's certification was a statute which provided for nothing more than "equivalency" either in instruction or in the qualifications for teachers. See, App. at 14a. The problem with such a statute, in the view of the North Dakota Supreme Court, is that such statutes have been generally found to be unconstitutionally vague. See, e.g., State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).

However, to suggest that states cannot or have not created any other type of statutory scheme is simply not correct. The vast majority of the twenty-two states which have enacted homeschool legislation have done so after the spate of decisions holding previous statutes void for vagueness. These newer statutes

usually create several alternatives to qualify parents to instruct their children while maintaining the state's interest in the quality of education. Three states will serve as good examples of the type of legislation that is available to states to assure itself that homeschoolers are receiving an adequate education.

Virginia. Enacted in 1984, the Virginia statute requires several items for home education. Virginia Code § 22.1-25-4.1. First, the parents must notify the local school authorities of their intent to teach their children at home. This notice must include, among other things, a description of the curriculum to be used during the course of the year.

Second, there are four ways that a parent may qualify to teach his or her children at home: 1. possess a baccalaureate degree in any subject from an

accredited institution of higher education; 2. hold or be qualified for a teaching certificate; 3. enroll the children in a correspondence course which has been approved by the state; or 4. provide a course of instruction which, in the judgment of the local superintendent, has the same learning objectives as the public schools, and, in the judgment of the local superintendent, that the parent is able to provide an adequate education. A parent who qualifies under items one through three need not get the approval of the local superintendent.

After a year of instruction, the parent is required to administer a standardized test approved for use in the public schools by the state board of education. These results must be furnished to the local superintendent. If the child falls below the fortieth per-

centile, then the parent must make other arrangements for the education of the child.

Virginia's statutory scheme is also notable for the inclusion of § 22.1-257 which mandates a religious exemption to parents and children who have a bona fide religious objection to attendance in school.

Washington. Enacted in 1985, Washington's law is similar to Virginia's in several respects. R.C.W. [Wash. Rev. Code] § 28A.27.010 (4).

Washington requires that the course of instruction be for the same number of total hours and in the courses of instruction required in the public schools. As to the qualification of the parents there are several options. A parent may do any one of the following to qualify: (1) be a certified teacher; (2)

be supervised by a certified teacher for one hour per week; (3) have forty-five college level quarter credits (i.e. one year of college); (4) completed a home-school training course; or (5) convince the local superintendent of his or her qualifications otherwise.

Like Virginia, there must be annual notification to the state of the intent to home school. There must also be an annual achievement test approved by the state board of education.

Tennessee. The legislature of Tennessee enacted this law in 1985. Tenn. Code Ann. § 49-6-3050. For students in grades K-8, a parent must: (1) notify the local school authorities; (2) maintain attendance records which are subject to review; (3) provide at least four hours per day of instruction; (4) possess a high school diploma or have passed a

GED test; (5) have his or her child tested by a standardized test in grades 2, 3, 6, and 8. There are a variety of requirements for consultation with local authorities if the child's achievement test scores fall below certain ranges. If a child falls behind one grade level for two years in a row, the family must cease homeschooling.

For grades 9-12, the parent must possess a bachelor's degree or seek an annual waiver from the state department of education.

However, parents who are enrolled in a homeschooling satellite program administered by a church-related school, and who are supervised by said school, are exempt from all other requirements of the statute.

Having reviewed just these three alternatives, and there are many others

with a similar variety and with similar flexibility and alternatives for parents, it is apparent that the North Dakota Supreme Court was in error when it said:

> Teacher certification appears to us to be among the least personally intrusive methods now available to satisfy the state's prime interest in seeing that its children are taught by capable persons.

App. at 14a.

Two things stated by the Supreme Court of North Dakota give proof that factually it acknowledged that teacher's certification failed the least restrictive means test. First is the quotation just given. It is insufficient to say that teacher's certification is "among the least personally intrusive methods" available. The finding must be that it is the <u>least</u> restrictive means available. By requiring advance notice, certain alternate parent qualifications,

notice of the curriculum in advance, and standardized testing, several states have arrived at methods much less restrictive than the North Dakota scheme.

The second statement by the North Dakota court which bears scrutiny is:

> In Rivinius, [328 N.W.2d 220 (N.D. 1982)], 328 N.W.2d at 229, this court recognized that although neither certification of teachers nor standardized testing is a perfect means to ensure the end sought to be attained, because testing does not reveal possible deficiencies until the end of a school term, standardized testing would likewise not "satisfy the state's interest in educating its youth." [Emphasis added].

App. at 13a.

This "ringing endorsement" of teacher's certification, that it is just as insufficient to satisfy the state's interest in education as a scheme which uses only standardized testing, demonstrates its failure on both halves of the compelling state interest test. This

interest is not served if all that can be said about teacher's certification is that it "would likewise not satisfy the state's interest in educating its youth." This certainly does not demonstrate compliance with the least restrictive means test either.

If there were legitimate educational evidence that teacher's certification were indeed necessary for the education of children, certainly more than three states would have discovered such evidence and would have required it for the protection of the children in those states.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the North Dakota Supreme Court.

June 17, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

Michael P. Farris, counsel of record for petitioners and a member of the bar of this Court certifies that on this day he mailed by First Class Mail three copies of the foregoing petition for writ of certiorari to counsel of record for respondents as follows:

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June 17, 1986

Michael P. Farris

MICHAEL P. FARRIS

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, *Plaintiff and Appellee*

v.

Thomas Patzer, *Defendant and Appellant*

State of North Dakota, *Plaintiff and Appellee*

v.

Peggy Patzer, *Defendant and Appellant*

State of North Dakota, *Plaintiff and Appellee*

v.

Raymond Larsen, *Defendant and Appellant*

State of North Dakota, *Plaintiff and Appellee*

v.

Lorita Larsen, *Defendant and Appellant*

Criminal Nos. 1096-1099

FILED BY CLERK
SUPREME COURT FEB 20 1986

Appeals from the County Court of Stutsman County, Southeast Judicial District, the Honorable Harold B. Herseth, Judge.

AFFIRMED.

Opinion of the Court by Levine, Justice.

Charles J. Gilje, P.O. Box 1706, Jamestown, ND 58401, for plaintiff and appellee.

Richardson, Blaisdell, Isakson & Lange, P.O. Box 488, Hazen, ND 58545 and J. Douglas Alexander, P.O. Box 2095, Sidney, MT 59270, for defendants and appellants; argued by Gregory L. Lange.

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, *Plaintiff and Appeliee*

v.

Richard Reimche, *Defendant and Appellant*

State of North Dakota, *Plaintiff and Appellee*

v.

Kathy Reimche, *Defendant and Appellant*

State of North Dakota, *Plaintiff and Appellee*

v.

Gerald Lund, *Defendant and Appellant*

State of North Dakota, *Plaintiff and Appellee*

v.

Sheryl Lund, *Defendant and Appellant*

Criminal Nos. 1101-1104

Appeals from the County Court of Bottineau County, Northeast Judicial District, the Honorable A. S. Benson, Judge.

AFFIRMED.

Opinion of the Court by Levine, Justice.

John R. Gregg, 424 Main, Bottineau, ND 58318, for plaintiff and appellee.

Richardson, Blaisdell, Isakson & Lange, P.O. Box 488, Hazen, ND 58545, for defendants and appellants; argued by Gregory L. Lange.

State* v. *Patzer and Larsen;
State* v. *Reimche and Lund

Criminal Nos. 1096-1099 and 1101-1104

LEVINE, Justice.

The defendants in these consolidated appeals,[1] parents who refused to send their children to school and instead sought to educate them in their homes, were convicted of violating North Dakota's compulsory school attendance laws, Chapter 15-34.1, N.D.C.C. None of the parents is a certified teacher or presently certifiable under state law, nor are their children being taught by certified teachers in the homes. The parents assert that their convictions should be reversed because the compulsory school attendance laws, as applied to them, unconstitutionally infringe upon their religious beliefs. We conclude that the state has an interest in the teacher certification feature of the compulsory school attendance laws which is of sufficient magnitude to override the burden imposed upon the religious interests claimed by the parents under the circumstances and, accordingly, affirm the judgments of conviction.

Tom Patzer and Peggy Patzer and Ray Larsen and Lorita Larsen were convicted in a consolidated bench trial in Stutsman County. The Patzers are Seventh Day Adventists and the parents of Jeremy, age eight at the time of trial. Peggy Patzer has taken two years of college instruction. Tom Patzer has a masters degree in divinity and at the time of trial served as pastor of the Seventh Day Adventist Church in Jamestown. Ray Larsen and Lorita Larsen are also Seventh Day Adventists and the parents of Michael and Brian, ages nine and seven respectively at the time of trial. Lorita Larsen has a bachelor of science degree in nursing. Ray Larsen has a bachelor of science degree in nursing. Ray Larsen is an ophthalmologist practicing in Jamestown. Although there is a state-approved Seventh Day Adventist School in Jamestown, the Patzers and Larsens chose

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[1] Pursuant to the defendants' request, we will treat their appeals as consolidated.

not to send their children to it because of their religious beliefs.

Richard Reimche and Kathy Reimche and Gerald Lund and Sheryl Lund were convicted in a consolidated bench trial in Bottineau County. The Reimches attend the Lutheran Brethren Church in Bottineau and are the parents of Rachel and Joshua, ages eight and ten respectively at the time of trial. Richard Reimche has a high school diploma and has taken one year of post-high school instruction. Kathy Reimcke has a high school diploma. Gerald Lund and Sheryl Lund are members of the Bottineau Seventh Day Adventist Church and are the parents of Naleah, age eight at the time of trial. Sheryl Lund has had one and one-half years of college education, and Gerald Lund has a high school diploma. Although the Reimche and Lund children had previously attended public schools, their parents decided for religious reasons to remove them from school.

The parents essentially believe that God has given them sole responsibility to educate their children. They fear that their children, by attending school at an early age, will become "peer socialized" and will accept the values and beliefs of their classmates rather than those of their parents. Peer socialization, they believe, will preclude their children from gaining the religious values the parents believe are essential to the spiritual salvation of their children. The parents testified that their children could be educated outside of the home at some point, but the ages at which they believed this could be accomplished varied, essentially depending upon when the particular child was mature enough to resist peer pressure.

Dr. Raymond Moore, president of the Hewitt Research Foundation; Dr. Donald Erickson, a professor in the Graduate School of Education at U.C.L.A.; and Rousas John Rushdoony, president of the Chalcedon Foundation, testified on behalf of the defendants. The essence of their testimony was that children under the age of thirteen are more susceptible to peer dependency than are children above that age, and that peer dependency could adversely affect their religious values; that home education, mainly because of the one-to-one relationship between teacher and child, is the most effective means of

educating a child; and that the state teacher certification requirements are unnecessary for a parent to successfully educate a child in the home. Dr. Moore testified that he had reviewed the educational procedures used by each family and found them adequate to secure a sound education for the children.

At the outset, we note that the issue in the present case is not whether the state may constitutionally impose a total prohibition of a home study alternative to institutional education. During oral arguments, counsel for the defendants informed us that the state has given approval to several home schools in which children are being instructed by persons who hold teaching certificates. The issue in this case is the narrower one of whether the parents, because of their religious beliefs, have the right to educate their children at home without complying with a law requiring certification of all persons who give instruction to children within the state.[2]

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[2] Section 15-34.1-03(1), N.D.C.C., provides an exception to the compulsory school attendance law when it is shown to the satisfaction of the school board:

> "1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws."

The state in this case has not asserted that a home school does not fall within the meaning of "a parochial or private school," and we therefore do not consider the question. Courts in other jurisdictions have reached divergent results when considering similar issues. *See, e.g., Burrow* v. *State*, 282 Ark. 479, 669 S.W.2d 441 (1984) [course of home study conducted by parents for their own child did not constitute a "public, private or parochial school" within meaning of statute]; *Delconte* v. *State*, 313 N.C. 384, 329 S.E.2d 636 (1985) [statutes providing that attendance at a "private church school or school of religious charter" or at a "qualified nonpublic school" satisfies compulsory school attendance requirement did not preclude home instruction]; Annot., 65 A.L.R.3d 1222 (1975). Constitutional challenges in those jurisdictions where the compulsory school attendance statutes had been interpreted as imposing a total prohibition on home schooling have been unsuccessful. *See Duro* v. *Dist. Atty., Second Jud. Dist. of N.C.*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 998, 79 L.Ed.2d 230 (1984) [state,

Resolution of a conflict among the state's interest in its compulsory education laws, the fundamental rights and interests protected by the free exercise clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children necessitates a three-fold inquiry: (1) whether the activity interfered with by the state is motivated by and rooted in a legitimate and sincerely-held religious belief; (2) whether the parents' free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their religious practices; and (3) whether the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the parents in exercising their religious practices. *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *State* v. *Rivinius*, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983); *State* v. *Shaver*, 294 N.W.2d 883 (N.D.

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which prohibited home schooling, had demonstrated an interest in compulsory education sufficient to override parents' religious interests and free exercise claim]; *Burrow* v. *State*, *supra* [statute prohibiting home instruction did not violate parent's first amendment free exercise rights]; *State* v. *Edgington*, 99 N.M. 715, 663 P.2d 374 (Ct. App.), *cert. denied*, 464 U.S. 940, 104 S.Ct. 354, 78 L.Ed.2d 318 (1983) [statute prohibiting home instruction did not violate equal protection clause]. Efforts to have courts recognize a fundamental constitutional right on the part of parents to educate their children at home premised on the penumbra of the first nine amendments and Fourteenth Amendment to the United States Constitution have also been unsuccessful. *See Hanson* v. *Cushman*, 490 F. Supp. 109 (W. D. Mich. 1980); *Scoma* v. *Chicago Board of Education*, 391 F. Supp. 452 (N.D. Ill. 1974); *but see* Devins, *A Constitutional Right to Home Instruction?*, 62 Wash. U.L.Q. 435 (1984); Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 Willamette L.J. 563 (1982).

We note that the North Carolina, Arkansas, and New Mexico statutory schemes at issue in *Duro*, *Burrow*, and *Edgington*, have since been altered, either by court decision or legislative enactment, to specifically allow for the home schooling alternative. *See Delconte*, *supra*; Ark. Stat. Ann. § 80-1503.4 (1985); N.M. Stat. Ann. § § 22-1-2 (U) and 22-1-2.1 (1985).

The defendants in this case have not challenged the state's curriculum requirements or the requirement that their schools be in compliance with all municipal and state health, fire and safety laws. We proceed on the assumption that the teacher certification requirement is the sole impediment precluding these parents from educating their children at home.

1980).

Counsel for the state in these cases have conceded, and we will therefore assume for purposes of argument, that the parents' decisions not to enroll their children in state-approved schools but to educate them in their homes are motivated by sincerely-held religious beliefs.[3]

The state contends, however, that the defendants have failed to establish that the compulsory attendance statutes impose a burden upon the free exercise of their religious beliefs. We disagree.

The nature of the burden on the defendants' religious beliefs in this case differs from that claimed by the defendants in *Rivinius* and *Shaver*. In those cases it was the very concept of state regulation and approval of the religious schools involved which was abhorrent to the religious beliefs of the defendants. There is no doubt that parents do not have the right to be completely unfettered by reasonable governmental regulations as to the quality of the education furnished their children. In *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1077 (1925), the Supreme Court held that although parents have a right to send their children to schools other than public institutions, the state nevertheless has the power "reasonably to regulate all schools, [and] to inspect, supervise, and examine them, their teachers and pupils; . . ." Thus, in *Shaver*, where the defendants had failed to show that the tenets of their religion forbade compliance with the specific requirements needed to obtain state approval, and where certified instructors were available and could teach in the religious

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[3] The County Court of Stutsman County held that the Patzers' and Larsens' actions were motivated by closely-held and deeply-rooted religious convictions and that the state's compulsory education laws burdened those beliefs. But the court concluded that the state's interest in the law was sufficient to override the defendants' free exercise claims.

The County Court of Bottineau County, however, appears to have held that the actions of the Reimches and Lunds were motivated by "an idealogical [sic] or philosophical belief" rather than a sincerely held religious belief and that the compulsory attendance statutes did not create a burden upon their religious beliefs.

school without violating the tenets of the defendants' religion, this court assumed for purposes of argument *only* that seeking state approval imposed a burden upon the defendants' religious beliefs. In *Rivinius*, *supra*, 328 N.W.2d at 227, where the defendants had shown that the tenets of their religion forbade compliance with the teacher certification requirement needed to secure state approval, but where the instructors in the religious school involved were in fact certifiable under state law, this court held that the defendants had "demonstrated that the state laws and regulations, to a degree, impose a burden upon their religious beliefs."

In the present case, the defendants do not object to state supervision in general. The parents do not claim that even if they had the requisite qualifications to become certified teachers under state law, the act of seeking certification itself would violate their religious convictions. Rather, the claim made here is that the teacher certification requirement imposes a substantial burden upon the parents' religious beliefs, which dictate that they educate their children at home, insulated from religiously adverse peer pressure they believe is present in institutional school settings, because they do not have at the present time and cannot obtain without substantial hardship the educational requirements necessary for teacher certification and, therefore, state approval of their home schools.

An indirect burden upon one's religious beliefs occurs when compliance with a challenged law or regulation is not inherently inconsistent with those beliefs, but the law or regulation operates so as to make more practically difficult the practice of those religious beliefs. *See generally Braunfeld* v. *Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Nevertheless, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld*, *supra*, 366 U.S. at 607, 81 S.Ct. at 1148, 6 L.Ed.2d at 568. *See also Sherbert* v. *Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965, 970 (1963). We concluded that the par-

ents in this case have demonstrated a burden, albeit an indirect one, upon their religious beliefs sufficient to require us to balance that burden against the state's interest in the teacher certification requirement.

Our next inquiry is whether "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin* v. *Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15, 24 (1972). Only a compelling state interest can justify burdening the free exercise of religion and the state must bear the burden of demonstrating the unavailability of less restrictive means of achieving its aims. *Sherbert*, *supra*, 374 U.S. at 403, 407, 83 S.Ct. at 1793, 1795, 10 L.Ed.2d at 972. *See also United States* v. *Lee*, 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127, 132 (1982); *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624, 634 (1981); *Rivinius*, *supra*, 328 N.W.2d at 227; *Shaver*, *supra*, 294 N.W.2d at 895.

The state's interest in the education of its children has been characterized as "perhaps the most important function of state and local governments," *Brown* v. *Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880 (1954), and as ranking "at the very apex of the function of a State." *Yoder*, *supra*, 406 U.S. at 214, 92 S.Ct. at 1532, 32 L.Ed.2d at 24. This court has held that "the state has a compelling interest in requiring minimum standards of education to insure adequate education of the children of the state to enable them to become viable citizens in the community." *Rivinius*, *supra*, 328 N.W.2d at 228 [Footnote omitted.]

In balancing an individual's right to freely exercise religious beliefs against a state's interest in assuring that its citizens receive quality education, a court performs a sensitive and delicate task. We begin this process of constitutional balancing by examining the factors found to be significant by the United States Supreme Court in *Yoder*, the principal decision relied on by the defendants in urging reversal of their convictions in this case.

In *Yoder*, the Supreme Court held that the state could not enforce its compulsory school attendance law against the parents of Amish teenagers who had completed the eighth grade in the public school system and were then withdrawn from school by their parents. The parents believed, in accordance with the well-established tenets of the Amish religion, that sending their children to public high school would endanger the salvation of both the parents and their children.

The *Yoder* Court indicated that the state's primary compelling interests in the area of education were to "prepare citizens to participate effectively and intelligently in our open political system" and to prepare "individuals to be self-reliant and self-sufficient participants in society." *Yoder, supra*, 406 U.S. at 221, 92 S.Ct. at 1536, 32 L.Ed.2d at 29. However, the Amish had shown a long-established and efficient system of informal vocational education designed to prepare their children for life in the relatively self-contained Amish community. The Amish had a history of three centuries as an identifiable religious sect whose way of life produced successful, self-sufficient, rural communities. Because the Amish children were assimilated into an agrarian society removed from other worldly influences, the values, goals, and attitudes of modern secondary education were found to be in sharp conflict with the fundamental mode of life mandated by the Amish religion.

Significantly, the Court weighed the fact that Amish children had attended, and would continue to attend, public schools through the eighth grade, and would continue to receive appropriate vocational education within the Amish community after leaving the public school system. The Court pointed out that the state could still constitutionally regulate the Amish schools as long as the regulations were "reasonable." *Yoder, supra*, 406 U.S. at 236, 92 S.Ct. at 1543, 32 L.Ed.2d at 37. The Court held that while the state's interest in compulsory education to age sixteen was important, it was not sufficient to outweigh the free exercise claim made by the Amish, with which the brief additional two-year period of formal education was found to interfere.

The relatively small increment of additional schooling

required by the state in *Yoder* cannot be overemphasized, because had that factor not been present, it is questionable whether the *Yoder* opinion would have garnered a majority of the Court. Justice White, in a concurring opinion joined by Justices Brennan and Stewart, stated:

> "This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory-education law is relatively slight, I conclude that respondents' claim must prevail, . . ." *Yoder*, 406 U.S. at 238, 92 S.Ct. at 1544, 36 L.Ed.2d at 38 (White, J., concurring).

The circumstances in the case before us lack the exceptional considerations present in *Yoder*. The defendants, unlike the Amish, are not members of a community with a long history of being a successful, self-sufficient segment of society. Furthermore, in *Yoder*, the Amish children attended public school through the eighth grade and then obtained informal yet efficient vocational training to enable them to assimilate into the self-contained Amish community. In this case, none of the children has completed the first eight years of primary education. None of the defendants' beliefs in home education is of long standing, nor have the defendants demonstrated a long history of successful preparation of children outside of schools for life in contemporary society. Although the defendants testified that a formal institutional school education would be appropriate for their children at some point in their lives, that point varied and depended essentially upon when the defendants considered their children of sufficient maturity to withstand exposure to peer pressure. In the meantime, they believe they can sufficiently educate their children even though they lack the qualifications the state has deemed essential for an effective educator.

While we may have no reason to suppose the religious convictions of these parents are any less sincere than those of the

Amish, a comparison of the *Yoder* considerations with those circumstances present in this case clearly reveals that the Supreme Court's decision in *Yoder* is not particularly helpful to their cause.

The defendants assert, however, that the state has failed to meet its burden of demonstrating that the teacher certification requirement constitutes the least restrictive means of ensuring that its primary interest in the education of children is met.[4]

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[4] The state did not formally introduce any evidence during the trials relating to the "compelling state interest" and "least restrictive means" issues. Rather, arguments were submitted by brief. However, the lack of formal proof on the issues of "compelling state interest" and "least restrictive means" is not necessarily fatal to its case.

A court may take judicial notice of legislative facts in reviewing the constitutionality of legislative schemes. *See* 1 Weinstein's Evidence ¶200[04] at pp. 200-20 through 200-21 (1985) [quoting Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup.Ct. Rev. 75, 84]; Explanatory Note to Rule 201, N.D.R.Evid.; *cf. Montana Auto. Ass'n* v. *Greely*, 632 P.2d 300, 303 (Mont. 1981); *Houser* v. *State*, 85 Wash.2d 803, 540 P.2d 412, 414-415 (1975), *overruled on other grounds*, *State* v. *Smith*, 93 Wash.2d 329, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980).

We note also that application of the "least restrictive means" analysis has not been uniform. *See*, *e.g.*, *United States* v. *Robel*, 389 U.S. 258, 267, 88 S.Ct. 419, 425, 19 L.Ed.2d 508, 516 (1967) ["It is not our function . . . to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake."]; Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969). The consequences of carrying the "least restrictive alternative" analysis to its logical extreme have been noted by Justice Blackmun:

> "I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' . . . I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a

They claim that teacher certification cannot be the least restrictive means of ensuring that the state's children are properly educated because most other states in the country have done away with "stiff" teacher certification requirements for home and private schools.

It has been held that the use of standardized testing of students as an alternative to teacher certification is "wholly inadequate to protect the state's rightful interests" in the proper education of its children. *Johnson* v. *Charles City Comm. Schools Bd.*, 368 N.W.2d 74, 81 (Iowa 1985). In *Rivinius*, *supra*, 328 N.W.2d at 229, this court recognized that although neither certification of teachers nor standardized testing is a perfect means to ensure the end sought to be attained, because testing does not reveal possible deficiencies until the end of a school term, standardized testing would likewise not "satisfy the state's interest in educating its youth." *See also Shaver*, *supra*, 294 N.W.2d at 900; *Fellowship Baptist Church* v. *Benton*, 620 F.Supp. 308 (D.C. Iowa 1985); *Sheridan Road Baptist Church* v. *Dept. of Educ.*, 132 Mich. App. 1, 348 N.W.2d 263 (1984); *State* v. *Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed*, 454 U.S. 803, 102 S.Ct. 75, 70 L.Ed. 72 (1981).

We are aware that some states have enacted educational "equivalency" statutes in an attempt to accommodate home schools without requiring certification of parents. *See generally* J. Tobak and P. Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. Dayton L. Rev. 1 (1982). However, these statutes, which generally provide that children be given instruction "substantially equivalent" to instruction given in public schools or provide that instructors have qualifications "essentially equivalent" to the minimum stan-

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means of nullification.

"I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. . . ." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188-189, 99 S.Ct. 983, 993, 59 L.Ed.2d 230, 244 (1979) (Blackmun, J., concurring).

We make this observation only to emphasize the care with which the "least restrictive means" analysis must be employed.

dards set for public school teachers, have undergone numerous vagueness challenges. *Compare Ellis* v. *O'Hara*, 612 F. Supp. 379 (D.C. Mo. 1985), and *State* v. *Newstrom*, 371 N.W.2d 525 (Minn. 1985), with *Bangor Baptist Church* v. *State of Maine*, 549 F. Supp. 1208 (D.C. Me. 1982), and *State* v. *Moorhead*, 308 N.W.2d 60 (Iowa 1981). Having local or state officials make subjective evaluations of parents' ability or lack of ability to teach their own children might very well be considered a more restrictive or intrusive method of gauging the qualifications of parents as educators than the present teacher certification requirement.

The state has the power to impose reasonable regulations as to the quality of the education and instruction furnished. In *Meyer* v. *Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042, 1045 (1923), the Supreme Court stated that "[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto." While a teaching certificate is no guarantee that the holder is a competent teacher, it does guarantee that the holder has been exposed to the knowledge that a competent teacher should have. *See Benton*, *supra*. We believe that the teacher certification requirement for instructors in public, nonpublic, or home schools is a reasonably narrow one and is amply justified. *See Jernigan* v. *State*, 412 So.2d 1242 (Ala. Crim. App. 1982). Teacher certification appears to us to be among the least personally intrusive methods now available to satisfy the state's prime interest in seeing that its children are taught by capable persons.

It is one thing to argue that state government should honor the good-faith efforts of parents to educate their children at home without requiring those parents to hold a teaching certificate. Indeed, ours is a diverse, ever-changing society and every reasonable effort should be made to accommodate those with disparate religious or philosophical beliefs and practices. However, to claim that the state's failure to alter or abolish the teacher certification requirement under these circumstances has resulted in the violation of constitutional rights is another

matter. Balancing the defendants' religious beliefs and the nature of the burden imposed upon those beliefs by the teacher certification requirement against the state's interest in certification as a means of ensuring that its children are educated by capable persons, we find the balance in this case tips in favor of the state.[5]The judgments of conviction are affirmed.

/s/ Beryl J. Levine
BERYL J. LEVINE
/s/ Gerald W. VandeWalle
GERALD W. VANDEWALLE
/s/ H.F. Gierke III
H.F. GIERKE III
/s/ Herbert L. Meschke
HERBERT L. MESCHKE
/s/ Ralph J. Erickstad, C.J.
RALPH J. ERICKSTAD, C.J.

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[5] The defendants have also claimed that their convictions should be reversed because they are in violation of Article I, Section 3 of the North Dakota Constitution. The extent of their argument is to quote that section in their brief and state that it is "a parallel provision" to the First Amendment. We deem this insufficient to raise for our consideration the state constitutional issue, and we decline to address it. *E.g.*, *Jones* v. *North Dakota Workmen's Comp. Bureau*, 334 N.W.2d 188 (N.D. 1983). *See generally State* v. *Jewett*, ____ Vt. ____, 500 A.2d 233 (1985).

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN COUNTY COURT
BEFORE HON. HAROLD B. HERSETH
STUTSMAN COUNTY JUDGE

Criminal Nos. 23786
23787
23752
23753
Consolidated

STATE OF NORTH DAKOTA,

Plaintiff,

v.

THOMAS PATZER, PEGGY PATZER,
RAYMOND LARSEN AND
LORITA LARSEN,

Defendants.

MEMORANDUM OPINION

The defendants stand charged with violation of compulsory school attendance, as provided under Chapter 15-34.1 of the North Dakota Century Code.

15-34.1-01, N.D.C.C. requires that, "Every parent . . . who resides within any school district . . . and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02 or 15-34.1-03 shall send or take such child to a public school each year during the entire time of such school session."

15-34.1-02 exempts the deaf, blind and mentally deficient.

15-34.1-02 exempts those parents who send their children to "parochial or private school approved by the county superintendent of schools and the superintendent of public instruction" and that "no such school shall be approved unless the teachers therein are legally certified in the State of North Dakota. . .". 15-34.1-03 exempts parents in other instances as well, but those instances have not been raised as a part of and are not material to this action.

15-34.1-05 states that, "Any person failing to comply with the requirements of this chapter is guilty of an infraction."

During trial, two of the defendants, Peggy Patzer and Lorita Larsen testified that they each have children who are in the control of themselves and their husbands, Thomas Patzer and Raymond Larsen, respectively, and that such children are educable and not deaf, blind or mentally deficient. That those children are not attending any approved public, parochial or private school and are residing within the Jamestown School District.

They further testified that their children are being taught by their parents in their homes.

The parents are not certified by the department of public instruction, nor is the school approved by the superintendent of public instruction.

The defendants do not challenge the constitutionality of the law on its face, but challenge the constitutionality of the compelling school attendance laws, as applied to them.

The main premise of the defense is that the defendants have a religious belief that obligates them, as parents, to provide the education of their children in the home and a religious conviction that the children should not go to a school out of the home until such time as they reach the age of eight or ten years.

The statutes challenged by the defendants have been tested in State v. Shaver 294 NW 2d 883 and State v. Rivinius 328 NW 2d 220.

The defense points to the "three-prong analysis of *Yoder.*"

Those prongs are, as set out in Shaver,

1. "whether or not the activity interfered with by the State is motivated by and rooted in a legitimate and sincerely-held religious belief",

2. "whether or not the parties' free exercise of religion had been burdened by the regulation, and the extent or impact on their religious practices", and

3. "whether or not the State had compelling interest in regulation which justified the burden on free exercise of the religion and overrode the interest of "(Amish)" parents in exercising their religious practices."

In considering the first prong, the defendants testified that they were Seventh-Day Adventists, and that the Seventh-Day Adventist faith was, or at least a substantial portion thereof, was based on teachings of Helen White, who advocated that children should be "free as lambs" until the age of eight or ten, and that formal education should not start at the early age of seven. Yet, while professing the belief that the children should be "free as lambs" the defendants appear to recognize the need for formal instruction, which has been provided by the defendants in their homes, as is evidenced by the defendants' own exhibits and testimony.

Upon cross examination of one of the defendants, it was shown that the Seventh-Day Adventist Church provides a parochial school which complies with state requirements and to which many persons of the same denominational faith send their children at age six.

Further, it was the testimony of the defendants that it was their belief, which I assume was based on religious faith, that their children should not be exposed to peer pressure until they have reached a later age. However, they seemed to recognize the need for their children to socialize with their peers. They testified that the social needs were partially being filled by their attendance at a weekly school for religious instruction, sponsored by the Seventh-Day Adventist Church.

While these apparent inconsistencies are difficult for me to resolve, it appears that the reasons for not sending their children to school are based, at least in part, on philosophical or personal consideration as well as religious beliefs.

I nonetheless believe and determine that the defendants' beliefs are closely held and deep rooted, with enough religious conviction. Their beliefs are based on their perception of God's role in the education of their children sufficient to make it necessary to consider the second prong.

The second prong, the demonstration that the exercise of the defendants' religion has been burdened by North Dakota's compulsory education, as it applied to the defendants, is that God demands that the defendants be responsible for the education of their children to age eight or ten, and at that age the children are ready to attend a school other than a home school, because at that age they are ready to withstand the peer pressure which will be inflicted upon them.

If we accept the premise that the defendants' beliefs, as discussed above, are religiously founded, then it would seem that there is little question that North Dakota's compulsory education is a burden on the defendants' exercise of their religious beliefs, i.e. the defendants' belief that the bible requires them to provide their children with home schooling, while the state law requires the defendants to attend a school with certified teachers.

This brings us to the third prong, which is whether or not the State has a compelling interest.

The State's interest in the education of its young people is well settled in this state. There is no question that the State does have, not only the right, but a constitutional duty to offer and make sure that children receive an adequate education.

The defendants, however, maintain that the State's obligations, in this regard, can be satisfied by a less restrictive means, manner or alternative.

The defendants introduced a great deal of *opinion* testimony,

which made the point that teacher certification is not an effective method of insuring the end sought by North Dakota compulsory attendance law. The defendants also offered *opinion* evidence which was that home schools are an effective means of providing education of children, which would provide the children of these defendants with an education that would satisfy the State's mandate to educate its young people, without burdening the defendants' exercise of religious beliefs. All of this opinion evidence was objected to by the State, and I withheld my ruling. I now admit the evidence and overrule the State's objection.

The defendants further suggest that because other states provide for home schools, the state of North Dakota is obligated to provide the home school as well.

I cannot agree.

The North Dakota Supreme Court in State v. Shaver stated that, "We recognize that courts are ill-equipped to act as school boards and determine the need for discrete aspects of a compulsory school educational program. (Citation omitted) The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality."

The Court stated further that, "Although North Dakota's minimal requirements for state approval of a private or parochial school may be imperfect, without the regulations the state would have no reasonable assurance that its recognized interest in providing an education for its youth is being protected. In time, other means of assuring quality education under circumstances which provide safety and health may evolve, but until such time, this means appears to be proper."

In State v. Rivinius our Supreme Court again stated that, "We recognize that neither certified teachers or standardized testing are a perfect means to insure the end sought to be attained. Neither one is an exact science, but is concerned with probabilities. Each method which purports to measure learning can be questioned as to its validity.

Standardized testing ordinarily does not result in the discovery of a deficiency in education until after the term, semester, or school year is over, which would, in effect, result in a child wasting its period of time if the results of standardized test indicated that the child's education was deficient. We do not believe such a result would satisfy the state's interest in educating its youth.

Although we are cognizant that teacher certification may also have deficiencies, we believe that teacher certification is an acceptable method of satisfying part of the constitutional mandate to the legislature to properly provide an education for its youth."

Further, our Supreme Court said in Rivinius that, "If a better solution is available which will have an even lesser affect on the religious beliefs than the present law under consideration, it should be through the legislative process."

The matter that has been placed before this Court is not that different from the matters of State v. Shaver and State v. Rivinius. The defendants are asking me to do what our Supreme Court says ought not to be done.

I determine that the present law does not unreasonably interfere with the liberty of the defendants in the upbringing and education of their children, and that the present laws do not unduly impinge on the constitutional rights of the defendants.

In accordance with the foregoing, I find each of the defendants guilty of violating the compulsory attendance provisions as set out in Chapter 15-34.1, N.D.C.C.

Sentencing will take place on the 19th day of March, 1985 at 9:00 A.M.

Dated this 25th day of February, 1985.

BY THE COURT:

/s/_____

HAROLD B. HERSETH
County Judge

STATE OF NORTH DAKOTA
COUNTY OF BOTTINEAU

IN COUNTY COURT
BEFORE A.S. BENSON, COUNTY JUDGE

Case Nos. CR505,
CR506,
CR507,
CR508

STATE OF NORTH DAKOTA,

Plaintiff,

v.

RICHARD REIMCHE,
KATHY REIMCHE,
GERALD LUND, AND
SHERYL LUND,

Defendants.

MEMORANDUM OPINION

This case involves the violation of the compulsory school attendance law(15-34.1 NDCC). The Defendants were charged under this section of the law for the failure to send their children to the Bottineau Public School. The children are in the care, custody, and control of their parents, and their residences are within the Bottineau Public School District. The children's names and birthdates are as follows: Joshua Reimche, 03/25/74; Rachel Reimche, 04/05/76; Naleah Lund, 10/01/76. The parents are teaching their children at home with materials from the Hewitt Research Foundation under the direction of Dr. Raymond S. Moore, who is the executive director of that founda-

tion.

It was stipulated that the cases be joined for purposes of trial. The facts on each case are essentially the same and this opinion will be directed to the cases as a whole.

None of the parents are certified teachers, and the evidence further indicated that the children are not being taught or instructed by a certified teacher, as provided by the laws of the State of North Dakota. It is further obvious that there is no claim that this is a private school.

The parents are using, as a defense, that the children are not gaining the moral or religious values necessary for healthy emotional growth for these youngsters by attending public school. The parents further maintain that they can devote more time to the needs of the children than is given in public school, and they testified that the children were exposed to bad influences such as pornography and profanity on the bus and other influences, which are less clear from the testimony. The Court gained the impression that the parents, in a general way, indicted society in general and not the public school for the failure of the moral and religious values, which apparently are being denied to their children. There was testimony which indicated that the parents would send their children to a private religious school, if there were private religious schools available but there are none in their area. The testimony further indicated that they had no specific criticism of the Bottineau Public School, except for class size and failure to ingrain in the children the moral and religious values, which in their opinion could better be taught at home or in a religious school.

It does not appear from the evidence submitted that the parents could avail themselves 15-34.1-03 of the NDCC or that their children would fall within any of the four exceptions listed in that section. The Court determines that the only defense that the Reimches' and Lunds' have, which would justify their failure to enroll their children in public school, is the Free Exercise of Religion Clause of the first amendment of the United States Constitution in *State* v. *Shaver* (1980) 294 NW 2d 883 the Court stated:

Parents who sent their children to a nonapproved fundamental Baptist church school were in violation of the compulsory school attendance law, and application of that law to such parents was not unconstitutional on basis of claim by parents that requiring children to be sent to an approved school was in violation of their rights under the Free Exercise of Religion Clause of the first amendment of the United States Constitution where compulsory school attendance at an approved school would not pose a very real threat of undermining the Bible Baptist Church members', including the parents', existing community and religious practices, and any burden imposed on the parents' free exercise of religion was minimal and far outweighed by the state's compelling interest in providing education for its people.

Dr. Raymond S. Moore, the expert who testified for the Reimches' and Lunds', gave excellent testimony involving the merits home school education has for children until they reach the age of ten or twelve years. He cited numerous studies that have been made attesting to the value of having the child in the home during the formative years, and the Court agrees that there may be value of this practice in many cases. Dr. Moore conceded that his foundation was in the business of selling home study materials and that the Reimches' and Lunds' were following the Hewitt Research Foundation course of study.

Dr. Moore testified in general terms and in support of the Reimches' and Lunds' and stated that the North Dakota public schools generally are good schools when compared with other schools in the nation. He further testified that, in his opinion, the educational standards of North Dakota are high.

It is the opinion of this Court that the State's interest in the education of its people and the enactment of 15-34.1 NDCC does not create a burden upon the Reimches' and Lunds' as far as their religious beliefs are concerned. The Court does not feel that the free exercise of religion by the Defendants has in any way been diminished and, if there is any diminishment of that right, it is minimal in its effect. There is no showing that the Defendants or their children would suffer any religious sanctions. The State's interest supersedes and creates no infringe-

ment upon the Defendants in this case.

The Defendants in not one instance pointed to specific facts where the Bottineau Public School was not fulfilling its obligation to properly educate the children. There was no objection to the certification of teachers or that a certified teacher could oversee the education within the home.

The Court finds that the Defendants are possessed of a belief, rightly or wrongly, that moral principles may be better instilled in the home and that the schools and society in general are detrimental to the children, as far as moral values are concerned. The evidence further indicates that there is no direct evidence linking the school system with any specific certainty as far as a moral diminishment of values to any of the children. There must be more than an idealogical [sic] or philosophical belief to invoke the Free Exercise of Religion Clause of the first amendment. *State* v. *Kasuboski* (1978, Wis App) 275 NW2d 101

> In prosecution of parents for failure to cause their eight children to attend public or private school, parents' contention that application of compulsory school attendance statute to them violated their constitutional right to freedom of religion was properly rejected, where record established that removal of children from public school system was based on parents' ideological or philosophical beliefs rather than fundamentally religious beliefs.

The Court finds the Defendants guilty of the violations charged in the complaints.

Dated this 26th day of March, 1985.

BY THE COURT:

A.S. BENSON, COUNTY JUDGE

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

File Nos. Cr. 1101-1104

Appeals From The (County) Court of Bottineau County

File No. Cr. 1101

State of North Dakota, *Plaintiff and Appellee*

v.

Richard Reimche, *Defendant and Appellant*

File No. Cr. 1102

State of North Dakota, *Plaintiff and Appellee*

v.

Kathy Reimche, *Defendant and Appellant*

File No. Cr. 1103

State of North Dakota, *Plaintiff and Appellee*

v.

Gerald Lund, *Defendant and Appellant*

File No. Cr. 1104

State of North Dakota, *Plaintiff and Appellee*

v.

Sheryl Lund, *Defendant and Appellant*

These appeals having been heard by the Court at the October, 1985 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H. F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Beryl J. Levine, Justices; and the Court having considered the appeals it is ordered and adjudged that the judgments of the court below be and the same are hereby AFFIRMED.

Dated: February 20, 1986. By the Court:

Attest: Joanne Eckroth
Deputy Clerk
of the Supreme Court.

Ralph J. Erickstad
Chief Justice
North Dakota Supreme Court

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

File Nos. Cr. 1096-1099

Appeals From The (County) Court of Stutsman County

File No. Cr. 1096

State of North Dakota, *Plaintiff and Appellee*

v.

Thomas Patzer, *Defendant and Appellant*

File No. Cr. 1097

State of North Dakota, *Plaintiff and Appellee*

v.

Peggy Patzer, *Defendant and Appellant*

File No. Cr. 1098

State of North Dakota, *Plaintiff and Appellee*

v.

Raymond Larsen, *Defendant and Appellant*

File No. Cr. 1099

State of North Dakota, *Plaintiff and Appellee*

v.

Lorita Larsen, *Defendant and Appellant*

These appeals having been heard by the Court at the October, 1985 term before: The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H. F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Beryl J. Levine, Justices; and the Court having considered the appeals it is ordered and adjudged that the judgments of the court below be and the same are hereby AFFIRMED.

Dated: February 20, 1986. By the Court:

Attest: Joanne Eckroth
Deputy Clerk
of the Supreme Court.

Ralph J. Erickstad
Chief Justice
North Dakota Supreme Court

STATE OF NORTH DAKOTA
IN THE SUPREME COURT BISMARK
CLERK OF THE SUPREME COURT
MRS. LUELLA DUNN

March 19, 1986

Mr. Gregory L. Lange
Attorney at Law
Richardson, Blaisdell, Isakson and Lange
P.O. Box 488
Hazen, ND 58545

Re: **State v. Patzner and Larson Cr. 1096-1099**
State v. Reimche and Lund Cr. 1101-1104

Dear Mr. Lange:

The Supreme Court has today entered an order denying the petition for rehearing in these cases.

In accordance with Rule 41(a), NDRAppP, the mandates of the Supreme Court will be forwarded to the Clerks of the County Courts after the expiration of seven days.

Sincerely yours,

Joanne Eckroth
Deputy Clerk
North Dakota Supreme Court

JE:tb

cc: MR. CHARLES J. GILJE
MR. JOHN R. GREGG
MR. J. DOUGLAS ALEXANDER
THE HONORABLE HARLD B. HERSETH
THE HONORABLE A. S. BENSON

Copies Sent to:
Lunds, Patzers, Reimches, Larsens, and Birsts, 3-25-86

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN COUNTY COURT
BEFORE HAROLD B. HERSETH
STUTSMAN COUNTY JUDGE

File No. 23,752

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
RAYMOND L. LARSEN, *Defendant.*

JUDGMENT OF CONVICTION

Defendant on the 25th day of February, 1985, having been convicted of the crime of "Violation of Compulsory attendance provisions," after trial by the Court, and sentencing on the matter having been set for the 19th day of March, 1985, at 9:00 AM, in the chambers of the Stutsman County Court.

Said defendant, through his attorney, having filed Waiver of Appearance on the 11th day of March, 1985, and no legal cause having been filed with this Court why Judgment should not be pronounced against the said defendant,

THEREFORE, the Court does adjudge and the sentence is that Raymond L. Larsen be assessed a fine in the amount of $500.00, and that the said fine shall be suspended upon the defendant's compliance with the following conditions, to-wit:

1. That the said Raymond L. Larsen shall enroll his school age children in a state approved school upon expiration of the appeal time, if none is taken; or immediately upon an affirmation by the North Dakota Supreme Court of this decision.

Dated this 19th day of March, 1985.

BY ORDER OF THE COURT:

HAROLD B. HERSETH, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN COUNTY COURT
BEFORE HAROLD B. HERSETH
STUTSMAN COUNTY JUDGE

File No. 23,753

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
LORITA V. LARSEN, *Defendant.*

JUDGMENT OF CONVICTION

Defendant on the 25th day of February, 1985, having been convicted of the crime of "Violation of Compulsory attendance provisions," after trial by the Court, and sentencing on the matter having been set for the 19th day of March, 1985, at 9:00 AM, in the chambers of the Stutsman County Court.

Said defendant, through her attorney, having filed Waiver of Appearance on the 11th day of March, 1985, and no legal cause having been filed with this Court why Judgment should not be pronounced against the said defendant,

THEREFORE, the Court does adjudge and the sentence is that Lorita V. Larsen be assessed a fine in the amount of $500.00, and that the said fine shall be suspended upon the defendant's compliance with the following conditions, to-wit:

1. That the said Lorita V. Larsen shall enroll her school age children in a state approved school upon expiration of the appeal time, if none is taken; or immediately upon an affirmation by the North Dakota Supreme Court of this decision.

Dated this 19th day of March, 1985.

BY ORDER OF THE COURT:

HAROLD B. HERSETH, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN COUNTY COURT
BEFORE HAROLD B. HERSETH
STUTSMAN COUNTY JUDGE

File No. 23,786

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
PEGGY PATZER, *Defendant.*

JUDGMENT OF CONVICTION

Defendant on the 25th day of February, 1985, having been convicted of the crime of "Violation of Compulsory attendance provisions," after trial by the Court, and sentencing on the matter having been set for the 19th day of March, 1985, at 9:00 AM, in the chambers of the Stutsman County Court.

Said defendant, through her attorney, having filed Waiver of Appearance on the 11th day of March, 1985, and no legal cause having been filed with this Court why Judgment should not be pronounced against the said defendant,

THEREFORE, the Court does adjudge and the sentence is that Peggy Patzer be assessed a fine in the amount of $500.00, and that the said fine shall be suspended upon the defendant's compliance with the following conditions, to-wit:

1. That the said Peggy Patzer shall enroll her school age children in a state approved school upon expiration of the appeal time, if none is taken; or immediately upon an affirmation by the North Dakota Supreme Court of this decision.

Dated this 19th day of March, 1985.

BY ORDER OF THE COURT:

HAROLD B. HERSETH, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN COUNTY COURT
BEFORE HAROLD B. HERSETH
STUTSMAN COUNTY JUDGE

File No. 23,787

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
TOM PATZER, *Defendant.*

JUDGMENT OF CONVICTION

Defendant on the 25th day of February, 1985, having been convicted of the crime of "Violation of Compulsory attendance provisions," after trial by the Court, and sentencing on the matter having been set for the 19th day of March, 1985, at 9:00 AM, in the chambers of the Stutsman County Court.

Said defendant, through his attorney, having filed Waiver of Appearance on the 11th day of March, 1985, and no legal cause having been filed with this Court why Judgment should not be pronounced against the said defendant,

THEREFORE, the Court does adjudge and the sentence is that Tom Patzer be assessed a fine in the amount of $500.00, and that the said fine shall be suspended upon the defendant's compliance with the following conditions, to-wit:

1. That the said Tom Patzer shall enroll his school age children in a state approved school upon expiration of the appeal time, if none is taken; or immediately upon an affirmation by the North Dakota Supreme Court of this decision.

Dated this 19th day of March, 1985.

BY ORDER OF THE COURT:

HAROLD B. HERSETH, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF BOTTINEAU

IN COUNTY COURT
BEFORE A.S. BENSON,
COUNTY JUDGE

Criminal No. CR508

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
SHERYL LUND, *Defendant.*

AMENDED CRIMINAL JUDGMENT and ORDER

On this 9th day April, 1985, came the State's Attorney of Bottineau County, State of North Dakota, and the Defendant, having appeared with Counsel; it is hereby

ADJUDGED, That the Defendant has been convicted by the Court of GUILTY in the crime of

VIOLATION OF COMPULSORY SCHOOL ATTENDANCE—Infraction as charged in the Complaint, and the Defendant having been asked by the Court whether she had any statements to make on her behalf, or wished to present any information in mitigation of punishment, or which would require the Court to withhold pronouncement of Judgment and Sentence, and no sufficient cause to the contrary having been shown; it is hereby

ADJUDGED That it is the Sentence of this Court that you Sheryl Lund, Defendant, shall comply with the following Order of this Court:

IT IS HEREBY ORDERED that the Defendant pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985.

FURTHER, the Defendant shall be assessed a fee of ONE

HUNDRED AND TWENTY-FIVE DOLLARS, which shall be payable on or before the 15th day of September, 1985. IT IS FURTHER PROVIDED, if the child is enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, this portion (one hundred and twenty-five dollars) shall be forgiven.

IT IS FURTHER ORDERED That the Defendant, Sheryl Lund, shall pay her fine and/or costs as follows:

Defendant shall pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985, to the Clerk of Court, Bottineau County, Bottineau, North Dakota.

FURTHER, if the Defendant's child is not enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, the Defendant shall pay an additional ONE HUNDRED AND TWENTY-FIVE DOLLARS as a fee to the Clerk.

Dated, this 16th day of April, 1985.

BY THE COURT:

A.S. BENSON, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF BOTTINEAU

IN COUNTY COURT
BEFORE A.S. BENSON,
COUNTY JUDGE

Criminal No. CR507

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
GERALD LUND, *Defendant.*

AMENDED CRIMINAL JUDGMENT and ORDER

On this 9th day April, 1985, came the State's Attorney of Bottineau County, State of North Dakota, and the Defendant, having appeared with Counsel; it is hereby

ADJUDGED, That the Defendant has been convicted by the Court of GUILTY in the crime of

VIOLATION OF COMPULSORY SCHOOL ATTENDANCE—Infraction as charged in the Complaint, and the Defendant having been asked by the Court whether he had any statements to make on his behalf, or wished to present any information in mitigation of punishment, or which would require the Court to withhold pronouncement of Judgment and Sentence, and no sufficient cause to the contrary having been shown; it is hereby

ADJUDGED That it is the Sentence of this Court that you Gerald Lund, Defendant, shall comply with the following Order of this Court:

IT IS HEREBY ORDERED that the Defendant pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985.

FURTHER, the Defendant shall be assessed a fee of ONE

HUNDRED AND TWENTY-FIVE DOLLARS, which shall be payable on or before the 15th day of September, 1985. IT IS FURTHER PROVIDED, if the child is enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, this portion (one hundred and twenty-five dollars) shall be forgiven.

IT IS FURTHER ORDERED That the Defendant, Gerald Lund, shall pay his fine and/or costs as follows:

Defendant shall pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985, to the Clerk of Court, Bottineau County, Bottineau, North Dakota.

FURTHER, if the Defendant's child is not enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, the Defendant shall pay an additional ONE HUNDRED AND TWENTY-FIVE DOLLARS as a fee to the Clerk.

Dated, this 16th day of April, 1985.

BY THE COURT:

A.S. BENSON, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF BOTTINEAU

IN COUNTY COURT
BEFORE A.S. BENSON,
COUNTY JUDGE

Criminal No. CR506

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
KATHY REIMCHE, *Defendant.*

AMENDED CRIMINAL JUDGMENT and ORDER

On this 9th day April, 1985, came the State's Attorney of Bottineau County, State of North Dakota, and the Defendant, having appeared with Counsel; it is hereby

ADJUDGED, That the Defendant has been convicted by the Court of GUILTY in the crime of

VIOLATION OF COMPULSORY SCHOOL ATTENDANCE—Infraction as charged in the Complaint, and the Defendant having been asked by the Court whether she had any statements to make on her behalf, or wished to present any information in mitigation of punishment, or which would require the Court to withhold pronouncement of Judgment and Sentence, and no sufficient cause to the contrary having been shown; it is hereby

ADJUDGED That it is the Sentence of this Court that you Kathy Reimche, Defendant, shall comply with the following Order of this Court:

IT IS HEREBY ORDERED that the Defendant pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985.

FURTHER, the Defendant shall be assessed a fee of ONE

HUNDRED AND TWENTY-FIVE DOLLARS, which shall be payable on or before the 15th day of September, 1985. IT IS FURTHER PROVIDED, if the child is enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, this portion (one hundred and twenty-five dollars) shall be forgiven.

IT IS FURTHER ORDERED That the Defendant, Kathy Reimche, shall pay her fine and/or costs as follows:

Defendant shall pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985, to the Clerk of Court, Bottineau County, Bottineau, North Dakota.

FURTHER, if the Defendant's child is not enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, the Defendant shall pay an additional ONE HUNDRED AND TWENTY-FIVE DOLLARS as a fee to the Clerk.

Dated, this 16th day of April, 1985.

BY THE COURT:

A.S. BENSON, COUNTY JUDGE

STATE OF NORTH DAKOTA
COUNTY OF BOTTINEAU

IN COUNTY COURT
BEFORE A.S. BENSON,
COUNTY JUDGE

Criminal No. CR505

STATE OF NORTH DAKOTA, *Plaintiff,*
v.
RICHARD REIMCHE, *Defendant.*

AMENDED CRIMINAL JUDGMENT and ORDER

On this 9th day April, 1985, came the State's Attorney of Bottineau County, State of North Dakota, and the Defendant, having appeared with Counsel; it is hereby

ADJUDGED, That the Defendant has been convicted by the Court of GUILTY in the crime of

VIOLATION OF COMPULSORY SCHOOL ATTENDANCE—Infraction as charged in the Complaint, and the Defendant having been asked by the Court whether he had any statements to make on his behalf, or wished to present any information in mitigation of punishment, or which would require the Court to withhold pronouncement of Judgment and Sentence, and no sufficient cause to the contrary having been shown; it is hereby

ADJUDGED That it is the Sentence of this Court that you Richard Reimche, Defendant, shall comply with the following Order of this Court:

IT IS HEREBY ORDERED that the Defendant pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985.

FURTHER, the Defendant shall be assessed a fee of ONE

HUNDRED AND TWENTY-FIVE DOLLARS, which shall be payable on or before the 15th day of September, 1985. IT IS FURTHER PROVIDED, if the child is enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, this portion (one hundred and twenty-five dollars) shall be forgiven.

IT IS FURTHER ORDERED That the Defendant, Richard Reimche, shall pay his fine and/or costs as follows:

Defendant shall pay a fee of ONE HUNDRED AND TWENTY-FIVE DOLLARS on or before the 15th day of June, 1985, to the Clerk of Court, Bottineau County, Bottineau, North Dakota.

FURTHER, if the Defendant's child is not enrolled in a public or private school in the State of North Dakota on or before the 15th day of September, 1985, the Defendant shall pay an additional ONE HUNDRED AND TWENTY-FIVE DOLLARS as a fee to the Clerk.

Dated, this 16th day of April, 1985.

BY THE COURT:

A.S. BENSON, COUNTY JUDGE

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Criminal Nos. 1096-1099

STATE OF NORTH DAKOTA,
Plaintiff and Appellee,

v.

THOMAS PATZER,
PEGGY PATZER,
RAYMOND LARSEN, AND
LORITA LARSEN,
Defendants and Appellants.

APPELLEE'S BRIEF

Appeal From Stutsman County Court
Harold Herseth, County Judge

CHARLES J. GILJE
119 Second Street Southwest
Post Office Box 1706
Jamestown, North Dakota 58401
Attorney for Plaintiff
and Appellee

MR. GREGORY L. LANGE
Attorney at Law
Post Office Box 488
Hazen, North Dakota 58545
Attorney for Defendants
and Appellants

STATEMENT OF THE CASE

The defendants were convicted in Stutsman County court of a violation of the law which is commonly known as the compulsory attendance law. They have appealed the convictions to this court. The following is a statement of the facts relative to the issues.

Raymond and Lorita Larsen live at Rural Route 1, Jamestown, North Dakota, a place that is within the Jamestown school district. (Trial transcript page 4, lines 1-7.) They have two children, Michael Larsen, born September 29, 1975, and Brian Larsen, born September 30, 1977. (Transcript page 4, lines 9-12.) Both of the children are educable. (Transcript page 4, lines 15-16.) During the school year commencing September 1, 1984, Raymond Larsen and Lorita Larsen had not sent nor taken their two children, Michael and Brian, to a public school. (Transcript page 4, lines 17-23.) Neither of the children is deaf, blind, or mentally deficient. (Transcript page 5, lines 2-6.) The Larsens had not been excused by the Jamestown public school board from sending their children to the Jamestown public school. (Transcript page 5, lines 7-10.)

Lorita Larsen testified that the other defendants, Thomas Patzer and Peggy Patzer, do the same thing, that is, keep their children home from a public school. (Transcript page 6, lines 2-5.)

Thomas Patzer and Peggy Patzer live within the Jamestown public school district (Transcript page 6, lines 17-25; page 7, lines 1-4.) Jeremy Patzer, born January 4, 1977, lives at home with them. (Transcript page 7, lines 5-7.) Jeremy Patzer is an educable child. (Transcript page 7 lines 10-11.) Neither Peggy Patzer nor Thomas Patzer had sent or taken the child to a public school since September 1, 1984. (Transcript page 7, lines 12-21.) The child was not deaf, blind, or mentally deficient. (Transcript page 8, lines 2-7.) Neither of the Patzers had been excused by the Jamestown public school board from causing the child to attend school. (Transcript page 8, lines 8-11.)

Mrs. Patzer testified that she was aware that Raymond

Larsen and Lorita Larsen did basically the same thing, that is, keep their children at home and educate them at home.

The facts above referred to established the prima facie case for the State, showing that the defendants had failed to comply with Section 15-34.1-01, N.D.C.C. That section requires that every parent who resides within any public school district and who has control over an educable child of an age of seven years to 16 years (not deaf, blind, or mentally deficient, nor a child having been excused by the school board) shall send or take such child to a public school each year during the entire time such school is in session.

ARGUMENT

The defendants presented a considerable amount of evidence at the trial relative to the virtues of home schooling and to the progress that had been made by their own children. It was the state's position then, and it continues to be the state's position now, that all of that was really irrelevant, it being a matter for the legislature to consider and not the courts. Anticipating that that would be the sum and substance of the testimony given by persons whom the defendants would call and purport to qualify as experts, the state interposed an objection, and requested that the same be a continuing objection. The objection is found on the bottom of page 18 of the trial transcript, commencing at line 18, and continues through page 23, line 16.

It was not for the trial court in this case to make a determination whether or not home schooling is an appropriate alternative, nor to determine whether or not the children were receiving a good education. As pointed out by the North Dakota Supreme Court in *State* v. *Shaver*, 294 N.W.2d 883 (N.D. 1980), as found on page 900:

> "The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality. Although North Dakota's minimal requirements for state approval of a private or parochial school may be imperfect, without the regulations the state would have no reasonable assurance that its recognized interest in providing an education for its youth is being

> protected. In time, other means of assuring quality education under circumstances which provide safety and health may evolve, but until such time, this means appears to us to be proper."

In *State* v. *Knoefler*, 325 N.W.2d 192 (N.D. 1982), the defendant had it sought in the trial court to bring in expert testimony to show the requirements that had been set out by the legislature

> "inadequately served the purposes of the legislation and that, therefore, the statute was unconstitutional." (At page 195)

After noting that, the Supreme Court in *Knoefler* went on to point out that it was not for the courts to reexamine the validity of legislative findings, and reject the same. The court said, as found on page 197:

> "Within the judiciary, at least, it is common knowledge that expert witnesses invariably are available on either side of an issue,and in many instances each side in a lawsuit will produce expert witnesses to support its position. We have no reason to believe that the situation is any different before the Legislature. As an illustration, let us assume it is the same, and the Legislature, after hearing the testimony, makes a decision, comparable to a finding, and enacts a law embracing the version of one side: We then ask, may the other side commence an action, present testimony, and have the court substitute its judgment for that of the Legislature? We think no. If this were permitted the courts would ultimately take over the functions of the Legislature and our basic concept of three separate but equal branches of government would become a nullity."

What the defendants attempted to do at the trial level is what they also attempted to do at the legislature, and that is to get the law changed to the way that their experts thought it should be. The testimony at the trial by the defendants' "experts", Raymond Moore, Donald Erickson, and Rausas [sic] Rushdoony, was all on the matters which the defendants thought were issues, but which really were not and still are not. They testified about a variety of things, including the quality of home schools, the "product" (the children) from home schools, and

the results of requiring certification of teachers as opposed to requiring test results of the students.

In the final analysis, we had merely a situation whereby the parents of these children made an individual determination that their children would be better off being educated at home rather than being educated in the school systems. Defendants could not say that there was no Seventh Day Adventist school available to them (the defendants were all Seventh Day Adventists, Mr. Patzer in fact being the local minister, and there was and still is a Seventh Day Adventist school located right in Jamestown).

Now it may be that the children of the Patzers and the Larsens are receiving the very best of an education at home. But should each and every parent regardless of their intentions be able to decide whether or not a given child should attend a public school or be educated at home? It goes without saying that one of the very fundamental reasons for having compulsory school attendance laws is that what one person's idea is as to a proper education for a child may not be the same as another's. It may be that family "A" believes that part of the basic education for a child between the ages of six and 10 years is learning how to drive a combine and a tractor, and that all this reading, writing, and arithmetic is a bunch of nonsense. To weed out family "A", families like the Patzers and Larsens must give way.

The defendants here used *Wisconsin* v. *Yoder*, 406 U.S. 205, 32 L.Ed 2d 15, 92 S.Ct. 1526 (1972) as authority for their position. *Wisconsin* v. *Yoder* is a world apart from the situation here. *Wisconsin* v. *Yoder* involved Amish people who educated their children at neighborhood public schools for the first eight grades. It was only after the children had completed their first eight grades that the Amish and the state got into conflict. The Amish children, attending the first eight grades at regular schools, were guaranteed access to acquisition of sufficient basic skills to provide a foundation for adult life outside of the religious community if they chose to go outside of the Amish community. In *Wisconsin* v. *Yoder* the children of concern were

near adults. Furthermore, the Amish had a long history of successful preparation of its children outside of the public schools for a life in contemporary society. The Amish had been for three centuries an identifiable religious sect whose way of life produced successful, self-sufficient, rural communities not incompatable with broader American society.

Having all children between the ages of seven and 16 somewhere within the supervision of county boards of education has numerous urgent public policy reasons. Our schools not only teach, but they are also responsible for administrating to the health needs of children by providing a reservoir of professional expertise capable of ferreting out health-related problems at an early state. Primary school pupils are administered eye and hearing tests to determine any impairment in these two crucial faculties. Regular attendance at the public school guarantees proper immunization from disease, at least one balanced meal per day, and a certain minimal protection from parental abuse or neglect (via reporting requirements).

It should also be noted that in *Wisconsin* v. *Yoder*, there being discussed was a community that was defined not only through common membership in a religious sect, but also geographically and culturally.

As further indication of the limit that the U.S. Supreme Court was placing on its holding in *Wisconsin* v. *Yoder*, as found on page 37 of 32 L.Ed it observed that the showing that was made by the Amish was one which "probably few other religious groups or sects could make".

Justice White, in his concurring opinion in *Wisconsin* v. *Yoder*, noted that it would be a completely different situation were it not for the fact that the Amish permitted their children to acquire the basic tools of literacy by attending grades one through eight. The children have an option to stay with the Amish life or go elsewhere, and since they have the basic tools that they acquire in grades one through eight, the state does not have as much a legitimate interest as it would have were that not the case.

Now, in the case before this court, children taught in a home may not get the same exposure as ones taught outside the home, and therefore not have available to them options later in life should they choose not to follow a lifestyle like that of their parents. The child should receive a general, well-rounded education, which may include, for instance, lessons learned by encounters with a bully or two. "Education" is not just that which is received in the classroom, but in the hallways and on the playgrounds. In *State* v. *Riddle*, 285 S.E.2d 359 (W.Va. 1981), the court noted that compulsory attendance laws forced children to relate to those outside their family, thereby avoiding the sequestration of children,

> "on a rural homestead during all of their formative years to be released upon the world only after their opportunities to acquire basis skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy, or productive lives." (At page 366).

Now, we would concede that the state is making argument on issues that it said were not relevant to this case at the trial level (nor relevant here at the Supreme Court either.) Because of the court's holdings in *State* v. *Rivinius*, 328 N.W.2d 220 (N.D. 1982) and *State* v. *Shaver*, supra, the constitutionality issue that has been raised by the defendants has already been answered. The arguments therefore hereinbefore on the merits of the children attending regular schools, something which we argued was irrelevant at the lower court, are asserted herein only inasmuch as it is on such that defendants argue.

DATED this 23rd day of July, 1985.

/s/_____

CHARLES J. GILJE
Attorney for the Appellee.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Criminal Nos. 1011-1104

STATE OF NORTH DAKOTA,
Plaintiff and Appellee,

v.

RICHARD REIMCHE, KATHY REIMCHE,
GERALD LUND AND SHERYL LUND,
Defendants and Appellants.

Appeal From The Judgment Of
The County Court Of Bottineau County

APPELLEE'S BRIEF

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and Appellee

STATEMENT OF THE CASE

I. Nature Of The Case, Proceedings And Disposition.

This is an appeal from a judgment of conviction rendered by the County Court of Bottineau County, the Honorable A. S. Benson presiding, which found that the Defendants had violated North Dakota's compulsory school attendance statute, N.D.C.C. Section 15-34.1-05.

Proceedings were initiated against the Defendants by criminal complaints dated September 11, 1984. The Defendants were summoned to appear on September 18, 1984, at which time they requested more time to consult with an attorney. The Defendants again appeared before the County Court on September 25, 1984, and again requested more time to locate defense counsel. The County Court set the matter for trial for November 1, 1984. The Defendants and their attorney, J. Douglas Alexander, failed to appear for trial on November 1, 1984. The cases were re-scheduled for trial for January 31, 1985, and were heard on that date. On March 26, 1985, Judge Benson issued a Memorandum Opinion finding the Defendants guilty of the offense charged. Judgments of conviction were entered on April 9, 1985.

II. Statement Of The Facts

Richard and Kathy Reimche are the parents of Rachel Reimche and Joshua Reimche, ages 8 and 10 respectively at the time of trail. Both children were educable, and neither was deaf, blind or mentally deficient. Both children were not attending a school approved by the Bottineau County Superintendant of Schools. The children were being educated by the parents in the home. Neither parent is a certified teacher. Neither of the children were kept away from an approved school in order to help support the family. T:pp. 7-9.

Gerald and Sheryl Lund are the parents of Naleah Lund, age 8 at the time of trial. Naleah was educable, and not blind, deaf or mentally deficient. Naleah was not attending a school approved by the Bottineau County Superintendant of Schools.

The child was being educated by the parents in the home. Neither parent is a certified teacher. The child was not kept away from an approved school in order to help support the family. T:pp. 19-21.

Richard Reimche was raised in the church of Mennonite Brethren, Kathy Reimche was raised in the church of the Missouri Synod Lutheran, and the Reimches now attend the Lutheran Brethren Church of Bottineau. T:p. 105 L. 15-20. It is the Reimches' personal belief to educate their children in their home and not that of their church. T:p. 139 L. 8-12. The Reimches' belief and decision to educate their children in the home was mainly based upon readings of books by John Holte and Dr. Raymond Moore. T:p. 116-117 and p. 131 L. 9-16. Richard Reimche believes that his children should be educated in the home until at least age 13. T:p. 116 L. 19-22. Kathy Reimche believes that at some time her children could be educated outside of the home, but such a determination depends upon the particular child. T:p. 138 L. 18-24.

Gerald Lund and Sheryl Lund are members of the Bottineau Seventh Day Adventist Church. T:p. 175 L. 12-17. Gerald Lund believes that only God and parents have the responsibility of educating children. T:p. 149-150. Sheryl Lund believes that the parent has the absolute right to educate a child. T:p. 168 L. 4-6.

ARGUMENT

I. North Dakota's Compulsory Attendance Statute Is Not An Undue Burden Upon Defendants' First Amendment Rights.

Case law requires a three-pronged inquiry in making an analysis of a claim that a governmental regulation improperly impinges upon an individual's First Amendment right. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *State* v. *Shaver*, 294 NW 2d 883 (ND 1980). A determination first must be made as to whether the person is motivated by a sincerely-held religious belief, secondly whether the person's free exercise of religion is unduly burdened by the regulation, and third, if such a burden exists, whether the government has a compelling interest in

the regulation which justifies the burden.

In the instant case, the State concedes that Richard and Kathy Reimche, and Gerald and Sheryl Lund were motivated by a sincerely-held religious belief when they decided not to enroll their children in an approved school, but decided to educate their children at home. While the Defendants' beliefs are not supported by a traditional or orthodox "religion" with any organized and formal structure or a cohesive group identity, it would be improper to exclude them from First Amendment protection since their beliefs in home education are rooted in a belief in a Supreme Being. *Welsh* v. *United States*, 398 U.S. 333. Therefore, the analysis of Defendants' claim of infringement must focus upon the second-prong of the inquiry. [sic]

In *Yoder*, the United State's Supreme Court decided Wisconsin's compulsory attendance statute was an undue burden upon the Amish and concluded:

> In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs. Id at 219.

The Supreme Court recognized the Conservative Amish Mennonite Church as an identifiable religious sect which had been in existence for over three centuries. The Amish were a religious community with their own system of vocational and technical training designed to prepare children for life in a rural, self-contained society:

> . . . the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, *shared by an organized group and intimately related to daily living*. . . . the Old Order Amish religion *pervades and determines virtually their entire way of life*, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the community church. Id at

216; emphasis added.

The Supreme Court determined that an undue burden existed since formal high school education beyond the eighth grade was *hostile* to Amish beliefs and it took the children away from their *community,* physically and emotionally. *Yoder* supra at 211.

The facts of the instant case relative to the inquiry of undue are distinguishable from those of the *Yoder* case. Neither the Lunds or Reimches are members of a religious group or sect which believes that children should be educated solely in the home. The Defendants' beliefs in home education are not of long standing. Richard and Kathy Reimche recently acquired their beliefs after reading books by John Holte and Dr. Raymond Moore. T:p. 116-117 and p. 131. Prior to the 1984 school year the Reimches sent their children to public school. T: p. 110.

The crux of the Lunds' and Reimches' beliefs in home education is that God has placed sole responsibility of education with the parent and any attendance of a child in a school, public or private, undermines that responsibility. However, unlike the Respondents in *Yoder,* the Defendants in the case have not shown that school attendance either places their children in a hostile environment or takes them away from the beliefs and values of the parents. It is necessary for the Defendants to make such a showing since the responsibility of proving or disproving undue burden rests with the party who claims the governmental regulation impinges upon the practice of their religion. *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

The Lunds and Reimches attempted to show an undue burden through the testimony of Dr. Raymond Moore. Dr. Moore testified that attendance in a school setting results in "peer socialization" which causes a child to become "peer dependent" for his values, habits and manners. T: pp. 48-50. Thus, Defendants argue that to place their children in an approved school [sic] would cause them to lose control over their children. T: p. 139 L 4-7.

Fortunately, "peer socialization" is not an unstoppable force.

Dr. Moore acknowledged that there is no way to determine when peer values might overtake parental values, and indicated that the instilling of values is dependent upon both quality and quantity of time with a child. T: pp. 79-82. Dr. Moore testified that while he was not aware of any studies concerning "peer socialization" in North Dakota schools, the concept is not necessarily negative and that a school setting can *reinforce* the *positive* values of parents. T: p. 84 L 6-25. According to Dr. Moore, North Dakota schools would be less likely to instill negative "peer socialization" due to the rural and agrarian life style which involves active work.

> I would say that gives North Dakotans and North Dakota schools a great advantage and its families too. T: p. 84 L 15-17

In an effort to put the negative concept of "peer socialization" into concrete terms the Lunds and Reimches testified to a single incident of an older student having pornographic material on a school bus. T: p. 124-125. The record is void of any evidence that attendance at an approved school in North Dakota would undermine the values of the Defendants, or that attendance at an approved school presents any greater danger to Defendants beliefs than would the usual day-to-day contact between Defendants' children and the Bottineau community. The determination of undue burden cannot rest upon the Defendants' subjective viewpoint, but must hinge upon an objective test of the facts. *State* v. *Rivinius*, 328 NW 2d 220, 231 (ND 1982).

II. North Dakota Has A Compelling Interest In The Education Of Children And The Compulsory Attendance Statute Is The Least Restrictive Alternative For Meeting That Interest

Should this Court somehow find that the compulsory attendance statute unduly burdens Defendants' free exercise of their religious beliefs, the State must show that it has a compelling interest in the regulation and that the regulation accomplishes its objective by the least restrictive alternative. This Court in *Rivinius* studied provisions of the North Dakota

Constitution and determined:

> These constitutional provisions all disclose that the state has a compelling interest in requiring minimum standards of education to insure adequate education of the children of the state to enable them to be viable citizens in the community. Id at 228.

Therefore, the only remaining issue is whether the compulsory attendance statute accomplishes its objective by the least restrictive alternative.

The focus of the least restrictive alternative issue centers upon the requirement for the use of certified teachers. Appellants Brief p. 34. Defendants' contend that North Dakota's requirement for use of certified teachers is unduly restrictive. However, this Court in *Rivinius* in discussing certification of teachers concluded:

> Although we are cognizant that teacher certification may also have its deficiencies, we believe that teacher certification is an acceptable method of satisfying part of the constitutional mandate to the legislature to properly provide an education for its youth. Id at 229.

The Supreme Court of Ohio in the case *State ex rel. Nagel* v. *Olin*, 415 NE 2d 279 (1980) was confronted with the issue of whether Ohio's compulsory education law could accomplish its objectives by a less restrictive standard. The Ohio Court suggest that the State Board of Education might consider a less restrictive alternative:

> Additionally the state board might refer to the *North Dakota* regulatory scheme approved in *State* v. *Shaver*, supra. That scheme required the issuance of state approval of a private or parochial school upon a showing that (1) *all teacher are legally certified*, (2) courses are offered in a prescribed range of secular subjects, and (3) the school is in compliance with all municipal and state health, fire, and safety laws. Id at 288; emphasis added.

A case in point was decided by the Supreme Court of Appeals of West Virginia in *State* v. *Riddle*, 285 SE 2d 359 (W.Va. 1981). In that case the West Virginia Court was faced by a claim that children could be properly educated by parents in

the home through the use of correspondence materials. Although West Virginia statutes did not require use of certified teachers, the statute required use of a person "qualified to give instruction." The Court stated:

> Nonetheless, we do note that the statute requires a *person* who is "qualified to give instruction" and not a correspondence school. Regardless of the quality of perpared instructional material there is no substitute for an educated teacher who is capable of answering questions and guiding inquiring minds into the new and uncontemplated directions to which any well-prepared material should inevitably lead. Id at 366.

Like West Virginia, North Dakota attempts to insure that children receive quality instruction. North Dakota requires not only certification of teachers, but also continuing education and training for teachers in order to maintain their certification. The compelling interest of the State to provide education to children can not [sic] be met by anything less than having instructors who have the ability and training needed to teach.

CONCLUSION

The Lunds and Reimches have failed to establish that North Dakota's compulsory attendance statute constitutes an undue burden on their religious beliefs. Based upon an objective test the Defendants have not shown how their beliefs would be undermined by attendance at an approved school nor have Defendants shown their attendance in an approved school would result in an exposure to "worldly influences" different from the exposure allowed by the parents in their day-to-day existence.

Should this Court conclude that the compulsory attendance statute is a substantial infringement upon the Defendants' First Amendment rights, then the State's interest in education of children is a compelling interest which the legislature has addressed by the least restrictive alternative.

Dated at Bottineau, North Dakota, this 22nd day of July, 1985.

Respectfully submitted,

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